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Supreme Court of the United States

OCTOBER TERM, 1955

No. 320

GEORGE B. PARR, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 12, 1955
CERTIORARI GRANTED OCTOBER 17, 1955

SUPREME COURT OF THE UNITED STATES

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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, LAREDO DIVISION

Criminal No. 17065

UNITED STATES OF AMERICA

vs.

GEORGE B. PARR

DESIGNATION OF RECORD ON APPEAL (omitted in printing)

[fol. 3] [Caption omitted]

[fol. 4] IN UNITED STATES DISTRICT COURT, SOUTHERN TEXAS—CORPUS CHRISTI DIVISION

INDICTMENT—Filed November 15, 1954

The Grand Jury Charges:

That on or about the 15th day of March, 1950, within the Corpus Christi Division of the Southern District of Texas and within the jurisdiction of this Court, one George B. Parr, late of San Diego, Texas, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1949, by preparing and causing to be prepared, at San Diego, Texas, and by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Texas, by depositing and causing to be deposited, at the Corpus Christi Division Office, a false and fraudulent income tax return wherein he stated that his net income for said calendar year was the sum of $49,075.04, and that the amount of tax due and owing thereon was the sum of $22,615.39, whereas, as

he then and there well knew, his net income for the said calendar year was the sum of $96,457.96, upon which said net income he owed to the United States of America an income tax of $56,050.46.

[fol. 5] In violation of Section 145 (b), Internal Revenue Code; 26 U.S.C., Section 145. (b).

Count Two

That on or about the 15th day of March, 1951, within the Corpus Christi Division of the Southern District of Texas, and within the jurisdiction of this Court, one George B. Parr, late of San Diego, Texas, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1950, by preparing and causing to be prepared, at San Diego, Texas, and by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Texas, by depositing and causing to be deposited, at the Corpus Christi Division Office, a false and fraudulent income tax return wherein he stated that his net income for said calendar year was the sum of $70,599.16, and that the amount of tax due and owing thereon was the sum of $38,312.60, whereas, as he then and there well knew, his net income for the said calendar year was the sum of $112,114.46, upon which said net income he owed to the United States of America an income tax of $70,570.76.

[fol. 6] In violation of Section 145(b), Internal Revenue Code; 26 U.S.C., Section 145(b).

Count Three

That on or about the 17th day of March, 1952, within the Corpus Christi Division of the Southern District of Texas, and within the jurisdiction of this Court, one George B. Parr, late of San Diego, Texas, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1951, by preparing and causing to be prepared, at San Diego, Texas, and by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Texas, by

depositing and causing to be deposited, at the Corpus Christi Division Office, a false and fraudulent income tax return wherein he stated that his net income for said calendar year was the sum of $44,698.31, and that the amount of tax due and owing thereon was the sum of $22,628.23, whereas, as he then and there well knew, his net income for the said calendar year was the sum of $70,713.86, upon which said net income he owed to the United States of America an income tax of $42,589.37.

In violation of Section 145(b), Internal Revenue Code; [fol. 7] 26 U.S.C., Section 145(b).

(S.) Thomas Woodson, Foreman of the Grand Jury.
(S.) James T. Down, Assistant United States Attorney, JTD:sep.

IN UNITED STATES DISTRICT COURT, SOUTHERN TEXAS, CORPUS CHRISTI DIVISION

PROCEEDINGS OF DECEMBER 1, 1954 ON ARRAIGNMENT AND PLEA

[Caption omitted]

APPEARANCES:

Counsel for Government: Mr. Malcolm R. Wilkey, United States Attorney, Houston, Texas.

Counsel for Defendant: Messrs. Looney, Clark & Moorehead, 1020 Brown Bldg., Austin, Texas, by Mr. Everett Looney and Mr. Thomas James.

Be it remembered that on the 1st day of December, A. D. 1954, the following proceedings were had in the above styled cause, pending in the said Court, before His Honor, James V. Allred, Judge of said Court, presiding, the Court sitting in Corpus Christi, Texas:

[fol. 8] Morning Session—December 1, 1954

Colloquy Between Court and Counsel

The Court: Call the next case, Mr. Clerk.

The Clerk: No. 6011, United States vs. George B. Parr.

The Court: Come around, gentlemen. Of counsel, Mr. Wilkey for the United States Attorney's office, and Mr. Everett Looney——

Mr. Looney: Everett Looney of Austin, Texas, and Thomas James of Austin, Texas.

The Court: All right. Have you gentlemen been furnished with a copy of the indictment?

Mr. Looney: Yes, sir.

The Court: Familiar with it; what will be the plea, Counsel?

Mr. Looney: Your Honor, if I may say a word——

The Court: Counsel, what I'm getting at is, ususally, unless it is a plea of guilty, they waive formal arraignment and reading of the indictment and——

Mr. Looney: We are going to do that, Your Honor, except if I might say a word or two.

The Court: Very well.

Mr. Looney: I can see now that the defendant must have [fol. 9] a bill of particulars. Now, before pleading on the arraignment, I wanted to mention that, because either I want to request that the arraignment be postponed or put counsel on notice, and the Court, that we are going to have to ask more than the ten days allowed subsequent to arraignment. I just wanted to make that statement.

If I understand it correctly, the rules require any motion for a bill of particulars to be within ten days unless the time is extended for good cause, and I understand further that the arraignment could be postponed; we are not asking that that be done, except we do want to make ourselves clear right at the beginning that the indictment is in the most broad, general terms, and we're going to have to have some particulars, at least we are going to have to request the Court to order the bill of particulars.

The Court: Well, in all these—most any of these cases that come up, in fact without exception, I have permitted

counsel to enter a plea, subject to motions to be filed within a given time, and I see no reason why that shouldn't be done in this case, to enter your plea, subject to the filing of certain motions. Now if you will indicate how long a time you wish, I will enter an order granting you reasonable time [fol. 10] within which to file any and all motions.

Mr. Looney: All right, sir. Then the Defendant waives the reading of the indictment and pleads not guilty.

The Court: Very well. Now how long would you like within which to—you may note on there, "Defendant waived formal arraignment and entered a plea of not guilty, subject to his right to file motions—" and I'll give you the date in just a moment. Now how long would you like within which to file your motions?

Mr. Looney: Your Honor, the indictment in this case was returned, if I recall, November the 18th. Is that the correct date?

Mr. Wilkey: I believe that is correct, Your Honor.

Mr. Looney: And we would like to have—this is the first of December, and Christmas season is coming on, we would like to have until about the middle of January, if that is not an unreasonable request.

The Court: Well, I feel that you ought to be able to make your motion for a bill of particulars sooner than that. If there are any other motions, I think that you ought to, in [fol. 11] order that Counsel will have time to reply and file any briefs that are necessary, if any,—what we usually do, I set a date within which motions are to be filed, and an original brief by one side, and grant the other side time to reply and file briefs, and then for a reply brief, if necessary, in case the motions are then submitted. It may be that there will be no opposition to the filing of a motion for a bill of particulars.

Mr. Looney: We are in this shape, if that's an unreasonable request, of course, I don't want to push it, but necessarily, we—I was engaged in some other matters at the time this bill of indictment was returned, at the time Mr. Parr consulted me, and the indictment is, I suppose, as broad as it could be put.

Mr. Wilkey: The indictment is in the usual form, Your Honor,—

Mr. Looney: That's correct,——

Mr. Wilkey: —in these income tax cases.

Mr. Looney: That's correct, Your Honor. I'm not raising any question—the usual form is rather broad, and if January the 15th would not be—I mean, it would be too long, why, just whatever time the Court feels like I should be—— [fol. 12] The Court: I have never tried one of these income tax cases; I haven't seen the indictment here; I understand that's what this is; but we had one submitted at Fort Worth in which a bill of particulars was ordered by the Court, and I rather assume that if it is in the usual language, that a bill of particulars would probably be in order, but I'm not passing on it in advance.

Mr. Looney: We have several motions, Your Honor,——

The Court: Well,——

Mr. Looney: I know the Christmas season's coming, and——

The Court: Well, I've been working in November. This is the first of December, isn't it? I have been dating everything in November. Well, I'll give you until the first Monday in January to file your motions, and any memorandum brief you wish to file. How long would the Government like to reply?

Mr. Wilkey: If the Defense is going to have from December 1, and of course they have seen a copy of the indictment prior to this time,—December 1 to January the 3rd, I believe it would be, we would like 15 days thereafter, Your Honor. [fol.13] The Court: All right. All motions to be filed, together with memorandum or brief, by the Defendant, on or before January 3rd. Reply briefs by the Government by January 17th. That will give you two weeks. Is that all right?

Mr. Wilkey: Yes, Your Honor.

The Court: And,——

Mr. Wilkey: On that, I have in mind that Counsel has announced that he is going to ask for a bill of particulars and also other motions. Of course we do not know what other motions, what nature or scope that he will have, that he will file, and if they are of the nature which, coupled with the bill of particulars, would require more time, we would then

—might have to ask the Court for more time after we see the nature of the motions filed.

The Court: Well, that frequently occurs, and Counsel will learn. I have extended time in many cases, and so if you get into a jam, why, you can write me a letter about it and send Counsel a copy and I'll have it noted on the docket. Now then, any reply brief on your part, Counsel for the Defendant, will be filed by the 24th of January. I'll give you a week to reply,——

[fol. 14] Mr. Looney: All right, sir.

The Court: —at which time, unless extended by the Court, the motions will be submitted, whatever motions are filed.

Now, subject to action on the motions and so on, I can't set any definite time for trial at this time, but it will probably be in March if—some time in March, depending, of course, on these motions.

Now, gentlemen, perhaps this is not necessary, but—I know both Counsel in this case—but I'm going to direct your attention to Rule 17 of the Canon of Ethics of the Texas State Bar, dealing with public statements by Counsel about cases pending in court, counsel on either side. I'm sure both of you agree with the spirit of that rule, and the place to try this case is in the courthouse here.

Mr. Looney: That's right. I appreciate Your Honor doing it, because sometimes the newspaper reporters don't appreciate a lawyer's position.

The Court: Well, there happens to be a rule of the Texas Bar, I think promulgated by the Legislature and the Supreme Court,——

Mr. Wilkey: I hope the Court has observed that in spite [fol. 15] of considerable and unprecedented advance publicity in this case, that Government Counsel hitherto have observed to the full that——

The Court: I'm not inferring anything to the contrary about either one, but I just, out of an abundance of precaution, feel that I should call attention to that, and that I expect Counsel on both sides to comply with it, because we've got to try all these cases here in the courtroom, on the evidence here. All right.

Mr. Looney: Thank you, sir.
Mr. Wilkey: Thank you, sir.

Reporter's Certificate to foregoing Transcript omitted in printing.

[fol. 16] In United States District Court, Southern Texas, Corpus Christi Division

Memorandum Opinion, Kennerly, J.—April 27, 1955—(Filed April 28, 1955)

Malcolm R. Wilkey, United States Attorney, and James T. Dowd, Assistant United States Attorney, of Houston, Texas; for Plaintiff.

Everett J. Looney, of Austin, Texas, Thomas James of Austin, Texas, Marvin K. Collie, of Houston, Texas, and Clyde L. Wilson, Jr., of Houston, Texas; for Defendant.

April 27, 1955.

[fol. 17] Memorandum

The Defendant, George B. Parr, is charged by indictment in this court with having made false and fraudulent income tax returns for the years 1949, 1950 and 1951.

There have been assigned to me for hearing four motions in the case. These have been heard under Local District Court Rule 25, and are disposed of as follows:

1. *Defendant's Motion for Bill of Particulars filed January 3, 1955, under Rule 7(f) of the Federal Rules of Criminal Procedure, reading as follows:*

> "(f) Bill of Particulars. The court for cause may direct the filing of a bill of particulars. A motion for a bill of particulars may be made only within ten days after arraignment or at such other time before or after arraignment as may be prescribed by rule or order. A bill of particulars may be amended at any time subject to such conditions as justice requires."

(a) I think the Government's answers to Paragraphs I, II, III and IV, of Defendant's Motion for Bill of Particulars [fol. 18] require that such paragraphs of such Motion be, and they are denied.

(b) I think however, that Paragraph V of Defendant's Motion for Bill of Particulars should be granted, but *only to the extent set forth in Pargaraph V of the Government's Answer to Defendant's Motion.* But, if, after the Government has made the disclosures set forth in said Paragraph V of its Answer, the Defendant is still unable to properly prepare his defense, he may again be heard in this matter.

2. *Defendant's Motion, filed January 3, 1955 for Discovery and Inspection under Rule 16 of the Federal Rules of Criminal Procedure, as follows:*

> "Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the Government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photo- [fol. 19] graphs and may prescribe such terms and conditions as are just."

(a) Defendant moves for discovery and inspection of all "books, papers, documents, transcripts and tangible objects" relating to this case and in the "possession of Plaintiff" *which were obtained from the Defendant or belonged to the Defendant or were obtained from others by seizure or process.*

Paragraphs I, II and III of the Government's Answer are as follows:

"I

The Government does not have in its possession any books, papers, documents, transcripts or tangible ob-

jects relating to the within cause obtained from the defendant.

II

The Government does not have in its possession any books, paper, documents, transcripts of tangible objects relating to the within cause belonging to the defendant.

III

The Government does not have in its possession any transcripts relating to the within cause obtained from others by seizure or process."

[fol. 20] Defendant's Motion is denied as to the matters set forth in Paragraphs I, II and III of the Government's Answer.

(b) The Government, in Paragraphs IV and V of its Answer, further replies to Defendant's Motion as follows:

"IV

The Government does have in its possession certain books, papers, documents and tangible objects relating to the within cause which were obtained from others by seizure or process.

V

With reference to those items in Paragraph IV above, the Government stands ready to permit the Defendant and his attorneys, under proper supervision and at a time and place designated by the Court, to inspect, copy or photograph these books, papers, documents or tangible objects relating to the within cause provided that:

(a) Defendant specifies which particular books, papers, documents or tangible objects he wishes to inspect, copy or photograph; and

(b) Defendant establishes that the above items were [fol. 21] obtained from others by seizure or process; and

(c) Defendant establishes that such items are material to the within cause; and.

(d) Defendant establishes that such request then

made is necessary to the proper preparation of the defendant's defense; and

(e) Defendant establishes that such request then made is reasonable."

If Subparagraphs (a), (b), (c), (d) and (e) of Paragraph V of the Answer of the Government be sustained, Rule 16 would be made noneffective. Defendant cannot specify what particular matter there is in the possession of the Government until he is awarded discovery and inspection. The Government in its above-quoted Answer admits that such matter was seized from others and it would be idle to require Defendant to prove it. Presumably such matter is material to the within cause or the Government would not have seized it. Defendant cannot know what such matter is until he sees and inspects it, and cannot until then say whether it is necessary for the proper preparation of his defense, or whether his request is reasonable.

Discovery and inspection under Rule 16 should be and is granted without the conditions which the Government [fol. 22] seeks to impose in Paragraphs IV and V of its Answer.

3. *Defendant's Motion for Subpoena Duces Tecum for Honorable Malcolm Wilkey, United States Attorney, under Rule 17(c) of the Federal Rules of Criminal Procedure, reading as follows:*

"(c) For Production of Documentary Evidence and Objects. A Subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."

In Bowman Dairy Co. vs. United States, 341 U.S. 219, a case similar to this, it is said that Rule 17(c) is chiefly to [fol. 23] expedite preparation for the trial. It is also said:

"Rule 16 deals with documents and other materials that are in the possession of the Government and provides how they may be made available to the defendant for his information. In the interest of orderly procedure in the handling of books, papers, documents and objects in the custody of the Government accumulated in the course of an investigation and subpoenaed for use before the grand jury and on the trial, it was provided by Rule 16 that the court could order such materials made available to the defendant for inspection and copying or photographing. In that way the control and possession of the Government is not disturbed. Rule 16 provides the only way the defendant can reach such material so as to inform himself.

But if such materials or any part of them are not put in evidence by the Government, the defendant may subpoena them under Rule 17(c) and use them himself. It would be strange indeed if the defendant discovered some evidence by the use of Rule 16 which the Government was not going to introduce and yet could not require its production by Rule 17(c). There may be [fol. 24] documents and other materials in the possession of the Government not subject to Rule 16. No good reason appears to us why they may not be reached by subpoena under Rule 17(c) as long as they are evidentiary. That is not to say that the materials thus subpoenaed must actually be used in evidence. It is only required that a good-faith effort be made to obtain evidence. The court may control the use of Rule 17(c) to that end by its power to rule on motions to quash or modify.

It was not intended by Rule 16 to give a limited right of discovery, and then by Rule 17 to give a right of discovery in the broadest terms. Rule 17 provided for the usual subpoena ad testificandum and duces tecum, which may be issued by the clerk, with the provision

that the court may direct the materials designated in the subpoena duces tecum to be produced at a specified time and place for inspection by the defendant. Rule 17(c) was not intended to provide an additional means of discovery. Its chief innovation was to expedite the trial by providing a time and place before trial for the inspection of the subpoenaed material. United States [fol. 25] v. Maryland & Virginia Milk Producers Assn., 9 F.R.D. 509. However, the plain words of the Rule are not to be ignored. They must be given their ordinary meaning to carry out the purpose of establishing a more liberal policy for the production, inspection and use of materials at the trial."

In view of defendant's Motion for Bill of Particulars under Rule 7(b), and his Motion for Discovery under Rule 16, I think it would be premature to at this time grant Defendant's Motion for subpoena duces tecum. It may or may not be needed in the preparation for the trial. Defendant's Motion for Subpoena Duces Tecum should and will remain on the Motion Calendar to await the outcome of Defendant's Motions for Bill of Particulars and Discovery.

4. *Defendant's Motion to Change the Venue in this case from the Corpus Christi Division to the Laredo Division of the Court under Rule 21(a) of the Rules of Criminal Procedure, reading as follows* (italics mine):

"(a) For Prejudice in the District or Division. The court *upon motion of the defendant* shall transfer the proceeding as to him to *another district or division* if [fol. 26] the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division."

(a) The Government opposes the Defendant's Motion. The pleadings, briefs, affidavits, exhibits, etc., filed and brought forth by both parties constitute a large record which I have examined and considered.

The cases which the Government cites,[1] many of which Defendant also cites, have been examined. They are helpful.

[fol. 27] They hold generally that a defendant in a criminal case has the burden of proof and must make a proper showing under the statute or rules in order to obtain a change of venue to another district or division. Each case cited shows the facts in that case and points out why such facts do or do not authorize or require such a change. In most of them a change of venue is denied. They also discuss newspaper publicity, etc., as a ground for a change of venue. In all of them it is held that a change of venue is in the sound discretion of the court and must be determined on the facts of each particular case.

(b) Originally Defendant's Motion was submitted on many affidavits and many newspaper clippings from certain Corpus Christi newspapers filed and offered by Defendant, and a few affidavits filed and offered by the Government. Later the Government asked and was granted permission to and has also filed and offered many affidavits. All these I have carefully studied. They, along with other portions of [fol. 28] the record, show the geographic location, population, etc., of the Corpus Christi and Laredo Divisions of the Court and of the county and town in which Defendant re-

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[1] Shockley v. United States, 166 F.(2d) 704 (C.A. 1949), certiorari denied 334 U.S. 830; Dennis v. United States, 171 F.(2d) 986, certiorari granted 337 U.S. 954; United States v. Mellor (D.C. Neb., 1946), 71 F. Supp. 53, affirmed 160 F. (2d) 757, certiorari denied 331 U.S. 848; Kott v. United States (5 C.A. 1949); 163 F.(2d) 984; United States v. Florio, 13 F.R.D. 296 (S.D. N.Y. 1952); United States v. Lattimore, 112 F. Supp. 507 (S.D. D. C. 1953); Kerston v. United States, 161 F.(2d) 337 (10 C.A. 1947), certiorari denied 331 U.S. 851; United States v. Carper, et al., (D.C. D.C. 1953) 13 F.R.D. 483; United States v. Moran (2 C.A. 1952), 199 F.(2d) 107; Shushan v. United States, (5 C.A. 1941) 117 F.(2d) 110; Allen v. United States (7 C.A. 1924), 4 F.(2d) 688; United States v. Mesarosh (D.C. W.D.Tenn. 1952), 13 F.R.D. 180.

sides. They also show the extent of circulation and places of circulation of the newspapers mentioned.

Many different opinions, viewpoints and ideas are reflected by such affidavits. Apparently many of the persons making them are not at all familiar with, or overlooked the fact, that the Court must follow the method fixed and required by law in selecting, summoning, and empaneling a jury in this case. Some of them apparently were so uninformed about the law and court procedure that they erroneously regarded the Motion by Defendant for a change of venue as a reflection on the people of the Corpus Christi Division, etc. Some took sides for or against the Defendant. A preponderance of the evidence reflected by such affidavits—and I have no doubt on the subject and find—that there exists in the Corpus Christi Division of the Court so great a prejudice against Defendant that he can not obtain a fair and impartial trial in this case in such division.

Regardless of their opinions, view, or ideas, substantially all of the persons who made such affidavits mention or refer to the publication of many articles about Defendant in [fol. 29] two newspapers published at Corpus Christi with large circulations in the Corpus Christi Division. Defendant has brought and offered in evidence clippings, etc., of a very large number of these articles or publications, extending over a period of several years and on down, which I have studied. I do not undertake to go into details about them, they speak for themselves. They are simply in evidence here and it is not within the province of the Court to either condemn or justify them. It is sufficient to say that the Defendant has therein been given, during recent years, much publicity, generally very unfavorable and sometimes most unfavorable. Such publications, generally with prominent headlines, are directly or indirectly with respect to Defendant or persons closely associated or said to be associated with him, and concern political matters, elections, law enforcement, taxation, etc., generally and in the town of San Diego, and in Duval County, where Defendant resides, and in some adjoining counties. They are also with respect to the killing at night of a young man at Alice, Texas, in connection with which Defendant and per-

sons associated, or claimed to be associated, with Defendant are mentioned. Also with respect to the stationing of Texas Rangers in Duval County, the investigation by the [fol. 30] Attorney General of Texas and others of Defendant and associates, and the affairs of Duval County and the enforcement of the law in such county. Also with respect to the impeachment of certain judicial and other officers thereof. Also with respect to many lawsuits filed on behalf of the state of Texas and the United States and others against Defendant and/or those associated with him. Reference is made to the clippings for full particulars. These publications whether standing alone or when considered in connection with such affidavits, support, strengthen and confirm my view that there is so great a prejudice against Defendant in the Corpus Christi Division that he cannot obtain a fair and impartial trial there in this case.

(c) This brings us to the question of where this case should be sent for trial. I discuss the suggestions shown in the Record.

I think it is clear that Rule 21(a) hereinbefore quoted must be construed in the light of the Sixth Amendment to our Federal Constitution, as follows (italics mine):

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the *State and district wherein the crime shall* [fol. 31] *have been committed*, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence."

The construction placed upon this Amendment has uniformly been that unless a defendant in a criminal case *waives his right* to be tried in the district in which the crime was committed, the case cannot be lawfully sent to another district for trial.

The offenses with which Defendant is charged are alleged in the indictment to have been committed in this district and this case must be tried in this district *unless the Defendant has waived his right in that respect.* An examina-

tion of the Record and particularly Defendant's Motion, show definitely that he has not done so. The holding here then must be, and is, that this Court is without power to transfer this case to any other district.

I think it is clear that Rule 21(a) hereinbefore quoted, and Rules 18 and 19 of the Federal Rules of Criminal Procedure, must be construed together. Rules 18 and 19 are [fol. 32] as follows (italics mine):

"Rule 18. District and Division:

Except as otherwise permitted by statute or by these rules, the prosecution *shall be had* in a district in which the offense was committed, but if the district consists of two or more divisions the trial shall be had in a division in which the offense was committed.

Rule 19. Transfer within the District.

In a district consisting of two or more divisions the arraignment may be had, a plea entered, the trial conducted or sentence imposed, *if the defendant consents*, in any division and at any time."

Defendant is charged in the indictment with having committed such offenses in the Corpus Christi Division of the Court, and under Rules 18 and 19 must be tried there unless he has, as provided in Rule 19, *consented* to a trial in some other division.

An examination of the Record and Defendant's Motion shows definitely that in filing and presenting his Motion under Rule 21(a) he has consented, as is his right, to a trial *only* in the Laredo Division. In fact, Defendant says in his brief, "We wish to be clearly understood that if the [fol. 33] case is not to be transferred to Laredo we prefer that it remain in Corpus Christi."

It is, therefore, under the law not within the power of the Court to transfer the case to either the Houston, Galveston, Victoria or Brownsville Division, but only to the Laredo Division.

Because of this view of the law I do not deem it necessary to decide, and because the information in the Record as to

conditions in the Houston, Galveston, Victoria and Brownsville Divisions is very meager, I do not deem it proper to decide the questions raised as to those divisions.

(d) The Government raises another question.

As I understand the Government's presentation of these matters it did not, when the case was first submitted, claim that it could not obtain a fair and impartial trial at the Laredo Division, nor does it do so now. It says in its Brief filed (italics mine):

> "That the Government would be under a *severe handicap* in prosecuting this defendant in the Laredo Division."

Later in its brief it modified such claim. It offers with its brief a large number of affidavits, about which affidavits it [fol. 34] says in its brief (italics mine):

> "The affidavits also show that the Government *might be* under a severe handicap in prosecuting this particular defendant in the Laredo Division, etc."

However, because of such claimed handicap the Government insists that the case be transferred to a division other than Laredo.

I have already discussed the lack of power in the Court to do so. I have also pointed out the state of the record with respect to conditions in the Houston, Galveston, Victoria and Brownsville Divisions.

But I have studied the briefs and affidavits of both the Government and Defendant with respect to conditions in the Laredo Division. The Government's affidavits show that certain conditions are believed to exist. Defendant's affidavits show that it is believed that they do not exist. No overt acts are alleged or shown. Apparently there exists a political controversy of long standing at Laredo, and many, or some of those making the affidavits for the Government, and many or some of those making them for the Defendant are in different political camps or hold radically different political views. The two groups, or [fol. 35] some of them, seem to now see each other "through a glass darkly". It might be said facetiously that they

seem to engender "more heat than light". Basing my findings, as I must, wholly on all the affidavits I do not think that the evidence shows that the Government either will or might "be under a severe handicap" in the prosecution of this case as claimed. I find to the contrary.

(c) My conclusion is that the Motion of the Defendant as made should be granted and the venue of the case should be changed from the Corpus Christi Division to the Laredo Division.

Let appropriate orders be drawn and presented in accordance with Paragraphs 1, 2, 3 and 4 hereof.

(S.) T. M. Kennerly, United States District Judge.

I concur.

(S.) James Allred, Judge.

IN UNITED STATES DISTRICT COURT, SOUTHERN TEXAS, CORPUS CHRISTI DIVISION

MOTION OF THE UNITED STATES TO DISMISS THE INDICTMENT UNDER RULE 48, WITH ATTACHED COPY OF TELEGRAM DATED MAY 3, 1955, TO MALCOLM R. WILKEY, UNITED STATES ATTORNEY, FROM H. BRIAN HOLLAND, ASST. ATTORNEY [fol. 36] GENERAL, AND A COPY OF THE INDICTMENT RETURNED BY THE WESTERN DISTRICT OF TEXAS, CRIMINAL 20825, ATTACHED—Filed May 4, 1955

Pursuant to Rule 48 of the Federal Rules of Criminal Procedure and by leave of Court endorsed hereon the United States Attorney for the Southern District of Texas hereby dismisses the indictment against defendant George B. Parr.

(S.) Malcolm R. Wilkey, United States Attorney.

Leave of Court is granted for the filing of the foregoing dismissal.

——, United States District Court.

MRW:LB.

TELEGRAM

Teletype—Rush

Washington, D. C., May 3, 1955, (9:17 A.M., EST)
Malcolm R. Wilkey,

C/O U.S. Attorney,
San Antonio, Texas.

[fol. 37] You are Authorized to Dismiss Indictment Pending in Southern District of Texas against George B. Parr for Violations of Section 145(b) Internal Revenue Code 1939 if and when Indictment Returned in Western District.

H. Brian Holland, Assistant Attorney General.

Rec'd 8:45 A.M., May 3, 1955, Tel/fwe

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF TEXAS

CR. No. 20825

UNITED STATES OF AMERICA

vs.

GEORGE B. PARR

INDICTMENT

The Grand Jury Charges:

That on or about the 15th day of March, 1950, within the Austin Division of the Western District of Texas, and within the jurisdiction of this Court, one George B. Parr, late of San Diego, Texas, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1949, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Texas, at Austin, Texas, a false and fraudulent income tax return wherein he stated [fol. 38] that his net income for said calendar year was the sum of $49,075.04, and that the amount of tax due and owing

thereon was the sum of $22,615.39, whereas, as he then and there well knew, his net income for the said calendar year was the sum of $96,457.96, upon which said net income he owed to the United States of America an income tax of $56,050.46.

In violation of Section 145(b), Internal Revenue Code; 26 U.S.C., Section 145 (b).

Second Count

That on or about the 15th day of March, 1951, within the Austin Division of the Western District of Texas, and within the jurisdiction of this Court, one George B. Parr, late of San Diego, Texas, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1950, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Texas, at Austin, Texas, a false and fraudulent income tax return wherein he stated that his net income for said calendar year was the sum of $70,599.16, and that the amount of tax due and owing [fol. 39] thereon was the sum of $38,312.60, whereas, as he then and there well knew, his net income for the said calendar year was the sum of $112,114.46, upon which said net income he owed to the United States of America an income tax of $70,570.76.

In violation of Section 145(b), Internal Revenue Code; 26 U.S.C., Section 145(b).

Third Count

That on or about the 17th day of March, 1952, within the Austin Division of the Western District of Texas, and within the jurisdiction of this Court, one George B. Parr, late of San Diego, Texas, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1951, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Texas, at Austin, Texas, a false and fraudulent income tax return wherein he stated that his net income for said calendar year was the sum of

$44,698.31, and that the amount of tax due and owing thereon was the sum of $22,628.23, whereas, as he then and there well knew, his net income for the said calendar year was the sum of $70,713.86, upon which said net income he [fol. 40] owed to the United States of America an income tax of $42,589.37.

In violation of Section 145(b), Internal Revenue Code; 26 U.S.C., Section 145(b).

(S.) G. Bedel Moore, Foreman of the Grand Jury,
(S.) Russell B. Wine, United States Attorney.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, CORPUS CHRISTI DIVISION

STATEMENT OF REASONS FOR DISMISSAL (United States)—Filed May 4, 1955

To the Honorable Judge of Said Court:

The United States has herewith filed a dismissal of the above styled cause in the usual form, subject to leave of Court being granted. Such dismissal has been filed on the instructions of and authority from the Attorney General of the United States, as shown by copy of telegram attached to the dismissal. As reason for such dismissal, we wish to advise the Court of the Following:

On May 3, 1955, an indictment against the defendant George B. Parr was returned by a Federal Grand Jury at San Antonio, Texas, said indictment charging the defendant in three counts with the same identical offense, as charged [fol. 41] by the indictment in the instant cause. Said indictment lies in the Austin Division of the Western District of Texas, being Criminal Action No. 20825, a copy of which is attached to the dismissal.

It is the duty of the Attorney General to determine in which District prosecution should be had, if prosecution lies in more than one District. It frequently happens that an indictment is brought subsequently in a second District and the original indictment in the first District dismissed. Where this situation exists, the courts recognize the duty

of the Attorney General and grant leave to dismiss the first indictment. U. S. v. Bryson, 16 FRD 453 (D. C. Cal. 1953).

As this Court knows, in income tax evasion cases venue may lie in either the district in which the tax return was filed, or the district which is the residence of the taxpayer. If trial is had in the district of the residence of the taxpayer, which is not the district in which the return was filed, the Government must necessarily bear an extra burden of proof in establishing that acts directed toward evasion of the tax took place in the district of residence. This is a burden which the Government does not have to bear if the trial is [fol. 42] had in the district wherein the return was filed, as the filing of the return is in itself an act sufficient to confer jurisdiction and establish venue. The Attorney General therefore by initiating prosecution in the Austin Division of the Western District, wherein the taxpayer Parr's return was filed, has thus chosen to bring the action where it unquestionably lies and where the Government would not be put to the additional burden of proving the exact situs of acts of the taxpayer directed toward evasion of tax, other than the filing of the return itself. The Government therefore by bringing the prosecution in the Western District thus avoids a risk which is necessarily inherent in any prosecution in the Southern District.

These problems of proof and venue have of course been present in this case from the beginning, and the decision to initiate prosecution originally in the Southern District of Texas was based on the evaluation of this and many other factors. At the present time, because of new factors introduced in the situation, the Attorney General believes that prosecution should be had in the Western District of Texas and has initiated action accordingly.

Among the recent factors weighing in the over-all appraisal of where prosecution should be had should be men- [fol. 43] tioned the recent decision of the Court to transfer venue from Corpus Christi to Laredo in the Southern District of Texas. This means that trial will be had in a division in which neither the taxpayer lives nor the Government chose originally to bring prosecution, and thus establishes a set of circumstances which was never in the contemplation of Government counsel at the time the

original prosecution was brought in the Southern District of Texas.

The decision of the Attorney General to initiate prosecution in the Western District of Texas in no way is to be construed as an evasion of the ruling of the Court transferring venue from Corpus Christi to Laredo. In argument on the motion for transfer of venue the defendant was insistent on a change of venue to Laredo and nowhere else, and failing that wished venue to remain in Corpus Christi. The Court in its opinion recognized the narrowness of the choice which confronted it under the law as it construed it and the nature of defendant's motion. The Court stated: "The holding here then must be, and is, that this Court is without power to transfer this case to any other District." (p. 13). And further, "It is, therefore, under the law not [fol. 44] within the power of the Court to transfer the case to either the Houston, Galveston, Victoria or Brownsville Division, but only to the Laredo Division." (p. 14).

Therefore, by initiating prosecution in the Western District the Attorney General has done what is well within his recognized power to do where dual venue exists, and he has exercised a power which this Court did not possess under the law considering the nature of defendant's motion—or at least as this Court so construed its powers.

While leave of Court is required by Rule 48(a) for dismissal of an indictment by the Attorney General or the United States Attorney, we point out that it has been an almost universal practice in this District to grant such leave as a matter of course. Before the advent of the Federal Criminal Rules the Government attorney could dismiss an indictment without leave of Court even being requested. We further point out that under the plain language of Rule 48(a) at the stage of proceedings which this case has reached the defendant has no standing in court to object to the dismissal of the indictment by the Attorney General or the United States Attorney. It is only when trial has begun and jeopardy attached that the defendant can object to the dismissal of the indictment.

[fol. 45] As pointed out above, the indictment in the Western District is identical in every particular with the indictment previously returned in the Southern District except

the language regarding the venue. In order that there may be no delay in the prosecution of this defendant, and in order that the labors of defendant's counsel shall not in any respect have been wasted, the Government hereby undertakes to recommend, if the defendant wishes to join therein, that orders be entered in the Western District in regard to the indictment returned therein in accordance with the opinion of this Court on defendant's motion for a bill of particulars, motion for discovery under Rule 16, and motion for inspection of documents and subpoena under Rule 17(c). The Government further agrees that it will supply the defendant with a bill of particulars with reference to the indictment in the Western District in Cause No. 20825, and will immediately arrange for the inspection of documents under Rule 16 with the defendant. In other words, if the defendant is willing, the case can proceed under the indictment in the Western District in all particulars without any delay. While counsel cannot of course bind the Court in the Western District, we believe that if [fol. 46] agreed orders consonate with this Court's opinion on the above three motions are submitted by counsel for the Government and the defendant, that the Court in the Western District would look with favor upon the entry of such orders. Of course, if the defendant does not desire to have orders entered in accord with the opinion of this Court on the above three motions, then the defendant has the perfect right to raise anew the questions which he has already raised in this proceeding in the Southern District, but in such event any responsibility for delay would be solely that of the defendant.

Further, in order that there may be no delay on the part of Government counsel in familiarizing themselves with facts and law of this case, Mr. James T. Dowd, Assistant United States Attorney in the Southern District who has worked for some months on this case, has been appointed by The Attorney General as a Special Attorney to assist the United States Attorney for the Western District in the prosecution thereof.

In the above undertakings the Government does more than it is obliged to do. In *U. S.* v. *New York Great Atlan-*

tic and Pacific Tea Co., 54 F. Supp. 257 (N.D. Texas 1944) the Court held that the Government had a right to dismiss [fol. 47] the indictment after a bill of particulars had been granted and the case set for trial. The Court stated: "That the defendants have been put to considerable trouble and expense in the employment of counsel, and otherwise looking after their own interests and getting ready for trial, seems to be no reason why the prosecution may not terminate the proceedings in the manner chosen here." 54 F. Supp. 258.

For the above reasons it is respectfully submitted that leave of Court should be granted to dismiss the indictment in this case. We are not aware of any case arising in this District, or indeed in any other District in Texas, where leave of Court to dismiss an indictment has not been granted. In the only two cases we have found in any federal jurisdiction in which leave to dismiss was denied, in *U. S.* v. *Krakowitz*, 52 F. Supp. 774 (Ohio 1943) the Court felt that the Government should not be satisfied with a plea of guilty to one count, but should prosecute *all* counts of an indictment, and in *U. S.* v. *Dot*, 101 F. Supp. 609 (Conn. 1951) the Court felt it improper to condition a complete dismissal as to one defendant on the pleas of guilty of other defendant. Neither decision is applicable to the [fol. 48] instant case on the facts. In neither case was there another indictment for the same offense outstanding against the same defendants.

In *U. S.* v. *Bryson*, 16 FRD 453 (D.C. Cal. 1953) there was another indictment pending, as in the case at bar, and the Court held The Attorney General should exercise his power to prosecute one and dismiss the other, which is the customary procedure. For the Court to refuse such leave to dismiss would indeed be extraordinary, and would compel the Government to prosecute this tax evasion case in a division in which neither the defendant lives nor the Government ever contemplated bringing the action in the first place, and in a division in which the Government has indicated above its doubts as to the wisdom of proceeding further. It is unquestioned that jurisdiction and venue lie properly in the Western District of Texas, wherein The Attorney General has initiated prosecution in Criminal No. 20825. Wherefore, leave is respectfully requested to

dismiss the pending action, Criminal No. 6011 in the Southern District of Texas.

Respectfully submitted, (S.) Malcolm R. Wilkey, [fol. 49] United States Attorney for the Southern District of Texas, James T. Dowd, Assistant United States Attorney for the Southern District of Texas.

In all matters stated above in reference to the prosecution of Criminal No. 20825 in the Western District of Texas, I concur therein with the undertakings of the Government as stated.

(S.) Russell B. Wine, United States Attorney for the Western District of Texas.

IN UNITED STATES DISTRICT COURT, SOUTHERN TEXAS, CORPUS CHRISTI DIVISION

MEMORANDUM OPINION—May 4, 1955

Malcolm R. Wilkey, United States Attorney, Houston, Texas, for plaintiff; Marvin K. Collie, Esperson Building, [fol. 50] Houston 2, Texas, Thomas James, Everett L. Looney, 1020 Brown Building, Austin, Texas, for defendant.

(May 4, 1955)

Defendant is charged in a three count indictment with income tax violations, 26 U.S.C.A. 145(b). Reference is made to a memorandum dated April 27, 1955, by the Honorable T. M. Kennerly and concurred in by the writer.

Counsel for the government has transmitted to the court a motion to dismiss, reading as follows:

> "Pursuant to Rule 48 of the Federal Rules of Criminal Procedure and by leave of Court endorsed hereon the United States Attorney for the Southern District of Texas hereby dismisses the indictment against defendant George B. Parr."

Counsel has likewise transmitted, in a separate document, a "statement of reasons for dismissal," in which it is shown,

among other things, that an identical indictment against Defendant was returned on May 3, 1955, in the Western District of Texas, at San Antonio.

Rule 48 reads in part as follows:

> [fol. 51] "(a) By Attorney for Government. The Attorney General or the United States Attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant."

Shortly before 5:00 P. M., on May 3, 1955, the United States Attorney called the court by long distance from San Antonio and advised that the new indictment had been returned there and that he, the United States Attorney, would move to dismiss the case here. He inquired whether the court would want the matter taken up in open court or otherwise. The court advised him to proceed as is usually done by motion to dismiss and to furnish a copy of such motion to defense counsel. The United States Attorney stated that he did not believe the defendant could be heard on the matter under Rule 48. The court stated that he had not read the rule in some time and suggested to the United States Attorney that he proceed in the usual manner.[1]

Shortly after 6:00 P. M., May 3, 1955, the Honorable Everett L. Looney, one of defendant's counsel, called the [fol. 52] court by long distance from Austin, stating that he desired to have an opportunity to look into the matter and be heard before the motion was acted upon. The Court advised him to address a letter to the court to this effect, with copies to adverse counsel.

Local rule 27 provides that motions in criminal cases shall be filed in the manner and within the time fixed by law and the Federal Rules of Criminal Procedure; and

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[1] The usual procedure is by motion to dismiss which generaly is granted as a matter of course. However, the court does have discretion in the matter as shown by the wording of the rule and reflected by the decisions cited by counsel for the plaintiff.

brought on by the Clerk on the motion calendar and forthwith sent to the judge under local rule 25.

Rule 47, Federal Rules of Criminal Procedure reads as follows:

"RULE 47. Motions

An application to the court for an order shall be by motion. A motion other than one made during a trial on hearing shall be in writing unless the court permits it to be made orally. It shall state the grounds upon which it is made and shall set forth the relief or order sought. It may be supported by affidavit."

[fol. 93] Rule 49 provides that written motions, other than those which are heard exparte, written notices, etc., shall be served upon the adverse parties. Since defendant's counsel have requested an opportunity to be heard upon the motion, plaintiff's counsel will proceed as originally suggested by the court by serving notice upon counsel for the defendant and bringing the motion on regularly under the rules. In view of the fact that the writer will be sitting in Brownsville during the next few weeks, the motion will be submitted to Judge Kennerly at Houston.

The Clerk is directed to file the motion for dismissal,[2] and notify counsel of the filing of this memorandum.

(S.) James V. Allred, Judge.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, CORPUS CHRISTI DIVISION

ORDER TRANSFERRING CASE FROM THE CORPUS CHRISTI DIVISION, SOUTHERN DISTRICT OF TEXAS, TO THE LAREDO DIVISION, SOUTHERN DISTRICT OF TEXAS, FOR TRIAL—Filed May 16, 1955.

[fol. 548] The Court having heard and duly considered the motion as amended of Defendant George B. Parr under

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[2] The motion for dismissal was not filed with the Clerk probably for the reason that it carried on its face a proposed order to be signed by the court.

Rule 21(a) Federal Rules of Criminal Procedure for transfer of this case from the Corpus Christi Division, Southern District of Texas, to the Laredo Division, Southern District of Texas, for trial, and being of the opinion that the motion should be granted and venue of the case should be changed from the Corpus Christi Division to the Laredo Division, in accordance with a written memorandum dated and filed herein on April 27, 1955:

It is hereby ordered, adjudged and decreed by the Court that the motion is granted and that the above styled cause be and the same is hereby transferred from the Corpus Christi Division of this District to the Laredo Division thereof, and that all further proceedings in the matter, including but not limited to the production of all books, papers, documents and tangible objects relating to said cause and the trial of this case, shall be had in the Laredo Division, Southern District of Texas.

It is further ordered that the Clerk of the Court for the Corpus Christi Division shall transmit to the Clerk of the [fol. 55] Court for the Laredo Division all papers in this proceeding, or duplicates thereof, and any bail taken.

Done at Houston, Texas, this 16 day of May, 1955.

(S.) T. M. Kennerly, United States District Judge.

I concur.

Done at Corpus Christi, Texas, this — day of ——, 1955.

James V. Allred, United States District Judge.

In United States District Court

Defendant's Opposition to Government's Application for Leave to Dismiss the Indictment and His Reply to Government's Statement of Reasons for Dismissal—Filed May 16, 1955.

To Said Court:

The events, all of them, leading to this hearing—for leave to dismiss the indictment—occurred with the same United States Attorney acting under the directions of the same Attorney General in charge of every step of this prosecution.

They had a choice between the Southern District and the Western District.

[fol. 56] They selected the Southern District for the place of prosecution by procuring a return of the indictment on November 15, 1954.

They remained quite pleased with their selection through the time of arraignment and through the motion stage, including the controversial venue question.

Not one time prior to the filing on April 28, 1955 of Judge T. M. Kennerly's April 27, 1955 Memorandum sustaining Defendant's motion to change the venue did they express any thought that a trial in the Southern District would put the Government to an "additional burden."

Five days after the filing of the aforesaid Memorandum the Government learned, the United States Attorney says, that a prosecution in the Southern District would be attended by a necessarily inherent risk which would not obtain in the Western District.

What is that "risk"? What is "the additional burden"?

The indictment is for the identical offense.

The venue allegation in the pending indictment in the Southern District reads:

> ". . . *by preparing and causing to be prepared, at* [fol. 57] *San Diego, Texas*, and by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Texas, *by depositing and causing to be deposited, at the Corpus Christi Division office*, . . ."

The venue allegation in the indictment returned in the Western District on April 3, 1955, is precisely the same as the venue allegation quoted above except for the omission of the italicized portion thereof.

Does the United States Attorney, as an officer of this Court and as a responsible representative of the Government in this case, in good faith bona fidely represent to this Court that there is any greater burden on him at this time to prove the venue allegations in the Southern District indictment than existed on November 15, 1954 when the indictment was returned at Houston?

Does he represent that there is any risk "necessarily inherent in any prosecution in the Southern District" that did not exist when the indictment was returned?

Candor and forthrightness will compel the United States Attorney to admit that any burden or any risk attendant [fol. 58] upon proof of the venue allegations is no different now than when the indictment was returned.

The United States Attorney will not, as indeed he cannot, say that the sufficient proof on the venue question is unavailable to him.

The foregoing being true, the *Statement of Reasons for Dismissal* is replete with plain unadulterated sophistry unbecoming an officer of this Court.

What the United States Attorney did not frankly say in his *Statement of Reasons for Dismissal* is that he is, and has been since the moment it was pronounced, displeased with the ruling of this Court moving this case from the Corpus Christi Division to the Laredo Division. This Court is not unmindful of the fact that while opposing venue at Laredo the United States Attorney repeatedly in his written arguments categorically stated that the Government did not oppose a change of venue from the Corpus Christi Division to the Houston Division, to the Galveston Division, or to the Victoria Division. He entertained no doubts throughout the time the venue question was being considered by this Court as to the availability of proof to show venue in the Southern District.

We believe the facts compel the conclusion that the in- [fols. 59-75] dictment in the Western District, followed by the motion for leave to dismiss in this district, is but an effort to circumvent the April 27 pronouncement of this Court ordering this case transferred from the Corpus Christi Division to the Laredo Division.

True, the United States Attorney has the right, though the propriety of the assertion of the right under the circumstances may well be questioned, to make the effort. This Court, however, is not compelled to place its judicial stamp of approval on the tactics here attempted by the United States Attorney.

[fol. 76] Conclusion and Prayer

In his *Statement of Reasons for Dismissal* the United States Attorney very generously offers to join defendant's counsel in recommending to the Judge of the Western District "that orders be entered in the Western District in Regard to the indictment returned therein in accordance with the opinion of this Court on defendant's motion for a bill of particulars, the motion for discovery under Rule 16, and motion for inspection of documents and subpoena under Rule 17(c)." He would thereby "save any delay in the prosecution of the defendants" and insure "that the labors of defendant's counsel shall not in any respect have been wasted." Assuming, arguendo, that the Judge of the Austin Division, Western District, should be amenable to this suggestion, the offer falls far short of either assuring that there "be no delay in the prosecution" or in assuring "that the labors of defendant's counsel shall not in any respect have [fol. 77] been wasted."

Should this case be dismissed, the defendant will be put to the necessity of making a thorough canvass of the Austin Division of the Western District of Texas to determine whether he has cause to move for a change of venue from the Austin Division to some other district or division under Rule 21(a). If such cause is found to exist, defendant must obtain the evidence to support such a motion. All this will be expensive and time-consuming and will necessarily result in "delay in the prosecution of this defendant." We have already done this job once. The record before this Court on the venue question, decided April 27, shows the enormity of the task.

We do not say that the United States Attorney is acting beyond his authority in seeking leave to dismiss.

We do not say that the Attorney General was acting beyond his authority in giving the United States Attorney authority to move for this dismissal, conditioned though it was on a prior indictment being returned in the Western District.

What we do say, and with all the emphasis and vigor we can summon, is that this Court is not required to sanction,

[fol. 78] and should not sanction, the effort here made by government counsel to thus set itself up as an appellate tribunal to review and nullify the previous order of this Court. An order granting the leave prayed for will do just that. It will create no more respect for the courts; it may result in less.

It is to be presumed that if this dismissal is denied, the case pending in the Western District under the rule of comity will be stayed upon proper and timely motion. Such a motion will be filed by the defendant.

Wherefore, for the reasons stated, and based upon the argument and authorities here presented, defendant prays that the motion for leave to dismiss the indictment be denied.

Respectfully submitted, (S.) Marvin K. Collie, Esperson Building, Houston, Texas, (S.) Clyde L. Wilson, Esperson Building, Houston, Texas, (S.) [fol. 79] Thomas E. James, Capital National Bank Building, Austin, Texas, (S.) Everett L. Looney, Brown Building, Austin, Texas, Attorneys for Defendant.

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 80] IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, CORPUS CHRISTI DIVISION

(Heard in Houston, Texas)

[Title omitted]

REPORTER'S TRANSCRIPT OF PROCEEDINGS HAD ON GOVERNMENT'S MOTION TO DISMISS INDICTMENT—May 16, 1955

Reporter's Certificate to following transcript omitted in printing.

[fol. 81] APPEARANCES:

Malcolm R. Wilkey, United States Attorney, Southern District of Texas, Houston, Texas; James Dowd, Assistant

United States Attorney, Southern District of Texas, Houston, Texas, For the Government.

Messrs. Looney, Clark & Moorhead; Brown Building, Austin, Texas, By: Everett L. Looney, Esq.; Marvin K. Collie, Esq., Esperson Building, Houston, Texas; Clyde L. Wilson, Jr., Esq., Esperson Building, Houston, Texas, For the Defendants.

[fol. 82] May 16th, 1955—Morning Session

Proceedings

Colloquy Between Court and Counsel

The Court: The case this morning is a Corpus Christi case, the United States of America versus George B. Parr, primarily to hear a motion by the Government to dismiss it.

I suggest, however, that I have been furnished with tentative copies of orders in the matters before, motions that were disposed of heretofore, and don't you think we ought to dispose of those orders first?

What is your pleasure?

Mr. Wilkey: Your Honor, I would suggest, pursuant, I believe, to a conversation that counsel, Mr. Collie, and I had with you last week, that the disposition of the orders should probably await the outcome of the Government's request to dismiss the case. We, of course, are amenable to any situation the Court wishes to take, but in all frankness, we did not come in at this time prepared on that—although we could, of course—we did not come in prepared to discuss the wording of the orders.

The Court: What do you say about it?

[fol. 83] Mr. Looney: Your Honor, I think that by all means the orders of the Court that were directed to be prepared in your April 27th memorandum, filed April 28th, should be entered, if for no other reason, for proper sequence.

The Court: I feel that way about it too. I am wondering if you could briefly run over those? It seems to me that they are just about in accordance with the opinion.

Mr. Looney: I don't have copies of that before me at this time, Your Honor.

Mr. Wilkey: I don't have copies either, Your Honor. Let me confer a moment with Mr. Dowd here.

Your Honor, after conferring with Mr. Dowd, who has studied these orders, we don't have any objection to the drafts of the orders as submitted by counsel for the defense, or their entry at this time.

The Court: I will say this about the order for the production of papers, that as submitted by the defendant they call for proceedings at Laredo, and so on, and I would rather substitute for that the other paragraph of the order for the production of papers, if you have it before you there.

Mr. Wilkey: No, Your Honor, we don't have.

The Court: If not, why, here is a copy. Do you have it [fol. 84] before you?

Mr. Wilkey: No, Your Honor, we don't have.

The Court: I think the clerk will want it back. Do you have a copy, counsel?

Mr. Looney: No, sir, I am sorry. I didn't bring mine, sir.

The Court: Well, I would like to substitute for the third paragraph this language:

"If the parties shall not have, within twenty days, agreed upon the time and place and manner for carrying out this order, then either party may apply to the Court for specific directions. It is believed, however, that the parties will be able to readily agree upon the procedure."

There is a procedure outlined in the one submitted by counsel for Mr. Parr, but I don't think it is very practical, and I think you can agree upon how you will do that, if you will get together on it. And so I am going to substitute what I have just read for the third paragraph, if you want to look at it.

Mr. Wilkey: That wording is satisfactory to the Government, Your Honor. As the Court read it over, I didn't get whether that specified that this would be done at Laredo or not, or did the Court leave it to the parties?

[fol. 85] The Court: The order submitted specified that it should be done at Laredo.

Mr. Wilkey: Yes, the third paragraph does.

The Court: Well, now this—let me see it, Mr. Clerk.

In other words, it may not be convenient, and I do not

think it necessary for the Court to dictate those things. You can probably agree on them.

Mr. Wilkey: By leaving it to the discretion of the parties here as to the time, place and manner of carrying this out, that is fine, Your Honor. It might come about that Laredo will not necessarily be the most convenient spot for either party, and we appreciate that change.

The Court: That is right. I am then signing that order. This is the 16th, is it not?

The Clerk: Yes, sir.

The Court: I am handing this to the clerk, making that substitution. The clerk will take out the old and put in the new one.

The next is the order on Defendant's Motion for Bill of Particulars. I think that is in accordance with the opinion rendered. Have you examined that?

Mr. Dowd: Yes, Your Honor, and I believe that is quite [fol. 86] all right.

The Court: I have signed and passed to the clerk then the order on the Bill of Particulars.

I have also signed and passed to the clerk the order with respect to the subpoena duces tecum.

I have also signed and am passing to the clerk the order transferring the case from the Corpus Christi Division to the Laredo Division.

It seems to me that we are now ready to take up the Government's motion for dismissal of the case. Are you ready to present it?

Mr. Wilkey: Yes, Your Honor.

The Court: Are you ready?

Mr. Looney: Yes, Your Honor.

The Court: You may present the motion for the Government then.

PRESENTATION BY GOVERNMENT

Mr. Wilkey: May it please the Court, the Government has filed in this case a dismissal of the action subject to leave of the Court being granted, as I believe is the procedure under Rule 48-A.

With that dismissal document, the Government has filed the authority conferred on me, by the Attorney General of the United States, to dismiss the indictment in the Southern

District of Texas conditioned upon an indictment of similar import being returned in the Western District. Also at-
[fol. 87] tached to that dismissal was the indictment, or a copy thereof, which was returned in the Western District of Texas on May 3rd.

As this Court is undoubtedly familiar, in income tax fraud evasion cases, the venue frequently lies in more than one district. That is to say, venue always lies in the district in which the collector's office is located. In the case here in the Southern District of Texas, that is at Austin, Texas, and has been for many years, and that is why for many years, here in the Southern District, all income tax fraud cases involving residents of the Southern District have customarily been tried at Austin. I think that one would have to go back many years to find an income tax fraud case tried here in the Southern District.

Venue lies at Austin because that is where the collector's office is located, and because the usual charge in a tax fraud case is that the act to evade the payment of the correct tax was the filing of a fraudulent return at the tax collector's office, and of course that would take place at Austin, Texas, and the indictment returned in the Western District so charges.

Now, in certain cases, acts leading to a tax evasion may
[fol. 88] have also taken place in the district of the taxpayer's residence, as in the case at bar, as alleged in the indictment in the Southern District of Texas.

In either case, however, wherever the Government chooses to bring its suit, it must prove that the acts leading to tax evasion, affirmative acts, took place in the district in which venue is chosen, and it is a comparatively simple matter to prove the filing of a return at the tax collector's office, but sometimes difficulties are encountered in proving other fraudulent affirmative acts in the district of the taxpayer's residence. Therefore, there is always some risk inherent in bringing the suit in the taxpayer's residence, if the residence happens to differ from the place where the return was filed, and it is for that reason that the Attorney General over a period of years has more or less adopted the practice of bringing it in the judicial district in which the collector's office was located.

Now, of course, the proof of the acts establishing venue and jurisdiction are only a part of the considerations that the Attorney General must have before him at the time that he considers whether to send the case to the Western District of Texas, or to send the case to the Southern District [fol. 89] of Texas. That is only one of the many factors which the Attorney General must consider. Having the choice on the facts of the case as to where to prosecute the case, the Attorney General, on the basis of all factors involved, made a choice, on all of the facts involved in August, to send the case to the Southern District for presentation to the grand jury, and after a grand jury investigation, if the facts justified it, for indictment in the Southern District.

Now, since that time several things have occurred which have led the Attorney General to a re-evaluation of his decision of last summer to prosecute the defendant Parr for tax evasion in the Southern District of Texas, and the Attorney General, having the choice under the statute of bringing the suit in Austin, in the Western District, or in the Southern District, as it was brought originally, has brought a new indictment in the Western District, and has instructed me to ask leave of the Court to dismiss the one in the Southern District.

The two indictments are similar in all respects, except the allegations of the acts conferring venue upon the Court, and they differ in the two indictments, but that is the only difference. The other items are the same.

[fol. 90] Now, I should like to point out to the Court, and I think the Attorney General owes a duty to the Court to point out, the reasons why the Attorney General made the decision to ask leave of the Court to dismiss in the Southern District, and among these reasons are these:

First of all, in August of 1954, last summer, when the Attorney General had to decide in which district to send this case for investigation by grand jury and prosecution, the situation in the Western District was that Mr. Charles Herring, United States Attorney there, was anticipated being replaced by an appointee of this administration. It was contemplated that he and the majority of his staff in that district—in fact, it has transpired that all of his staff has left—that the United States Attorney and his

entire staff perhaps would be changed during the time that this case was being investigated by the grand jury and then prosecuted in the courts in the Western District, and so for continuity of prosecution, it was advantageous to send the case to the Southern District, where a new United States Attorney and staff had already been selected.

I point out that this case, as was announced publicly, [fol. 91] was not necessarily ready for indictment at the time that it was submitted to me. It was announced that a grand jury investigation was to be held, and it was held here in Houston, and over forty-one witnesses were called before that grand jury. Now, if that had been done in the Western District of Texas, the people interrogating the witnesses before the grand jury would have accumulated a great knowledge about the intricacies of this case and the personalities involved, which would not have been available to Mr. Russell Wine, the new United States Attorney there and his staff, and the events have justified the Attorney General's consideration of that point because Mr. Wine has come in, and there is not one assistant left, except at El Paso and in the lands division, who was in Mr. Herring's office.

Now, in this case, by the new indictment in the Western District, and the appointment of Mr. James Dowd here as special assistant to the Attorney General to prosecute the case in the Western District, a continuity of prosecutive effort has been attained, which could not have been attained by submitting the case to the Western District in the first place.

So there is one important change that has taken place [fol. 92] since this indictment was first sought last fall, a complete change in the prosecutive staff and set up in the Western District.

A second thing of importance in the Attorney General's consideration has been the change in the case from trial at Corpus Christi to Laredo. When this case was up for consideration, it was considered that the indictment would be brought and the case, the venue would properly lie in Corpus Christi, which happens to be the home division of the defendant. It was never contemplated that the case would be transferred to Laredo, and it being the home dis-

trict or division of the defendant, it was not contemplated, in fact, that the case would be transferred anywhere, because, in all frankness, we thought the defendant would be satisfied to try his case on his own home grounds. In fact, he might be considered to have an advantage there rather than somewhere else. But since that time the defendant has chosen to ask a change of venue to Laredo, which has been granted, and we are not here to re-argue the reasons for that, but we do point out that this introduces a new element into the consideration of the Attorney General as to where this case should be prosecuted, and since up until the time of trial under Rule 48-A the Attorney [fol. 93] General has the power to dismiss, with leave of the Court, and the defendant is not in a position to object under the rules, and under all former practice up to the time these rules were adopted the Attorney General exercised his power to bring another indictment in another district when confronted with another situation that he did not anticipate last August or September.

There is a third thing that affects not only the composition of the jury panel which might be considered, as comparing Laredo and Corpus Christi, Laredo being a much smaller division—75,000 over 320,000 in Corpus Christi—but thirdly there is also the problem of the witnesses in this case. Without revealing in great detail the nature of the Government's case, I point out to the Court that this case in great part will be based on the testimony of witnesses who are residents and long time acquaintances and friends of the very defendant in this case. These witnesses, in most instances, are reluctant, and in some instances are hostile. We feel that the trial of the case in Laredo, close to the defendant's seat of political power and his associations there, would have an adverse effect on eliciting the truth from the witnesses the Government will be forced [fol. 94] to bring in order to establish this case.

In all frankness, in the interest of justice, in the interest of getting the truth from a large number of witnesses who are absolutely essential to the prosecution of the Government's case, we feel that those witnesses will testify more freely, more honestly, more frankly, more to the truth of the matters which should be proved in his case, the

farther removed they are from the American-Mexican border district, in which Laredo is located.

That is a third important reason which changes the appraisal that any prosecuting officer must necessarily make of the choice of venue in a case.

A fourth thing which might be said should have been anticipated, but which was not, has been—I refer to newspaper publicity in regard to this case. It is evident from the attention which the newspapers in Corpus Christi, and in Laredo, and along the American-Mexican border, Brownsville, have given to the case of this particular defendant, that the trial of his case will be attended by an undue amount of publicity.

The jurors would go home every night to hear on the radio the newscast, the local newscast, and read in the [fol. 95] evening papers a description of the evidence they heard in the court that day, interpreted, honestly, but interpreted, by newspaper reporters. That same would be true the next morning at breakfast before they came down to listen to the evidence on the case for that day.

Now, if this case is tried, as I pointed out in our opposition to the change of venue, in Houston, or Galveston, where the newspaper publicity has not been nearly so intense as it has been down at Corpus Christi or Laredo, or Brownsville, then we will have the trial of a case which is another income tax fraud case and not the particular dramatic trial of this particular defendant, which it would be in Laredo or along the border. I do not say there will not be intense publicity in Corpus Christi, Laredo or Brownsville, no matter where this case is tried, but the jurors who are trying the defendant and hearing the evidence of the Government, and of the defendant, will not be reading those newspapers, but they will be reading the newspapers in their own home town, which have not given an extraordinary amount of publicity to this case. Every move in this case has been followed in the Corpus Christi and Laredo papers, while I have noted that in some in- [fol. 96] stances the filing of papers was merely noted in the Houston papers, for example, and in some cases not even mentioned. I think the same—although I have not checked it—I think the same, to a degree, would be true of Austin, or other places in the Western District.

Now, for those four reasons, Your Honor, the change in the prosecutive staff and set up in the Western District, the change of venue to Laredo, affecting the choice, the wide choice, of jurors available, thirdly the influence of the vicinity of the trial on the witnesses which the Government must necessarily call to establish its case, and fourthly the advantage both to the defendant and Government alike of trying this case in an atmosphere of a lawsuit and a trial in a court of justice, rather than a drama in which the jury or jurors find themselves taking a leading role. For these four reasons, the Attorney General believes the trial should be conducted in the Western District.

Now, I have spoken of the reasons animating the Attorney General in bringing the indictment in the Western District, and instructing me to dismiss it in the Southern District. If any of those reasons seem to this Court to [fol. 97] be sound, or that the Attorney General, in all reason, could consider them sound, then I submit under Rule 48-A the Attorney General has the power and the right to dismiss this action and leave of Court should be granted.

I do not think that Rule 48-A, even though it was modified from the previous practice, was intended to vest in the courts the discretion of the chief prosecuting officer of the Government as to where the prosecution should be brought and as to where it was advisable, from the Government's point of view, to bring the prosecution, assuming that the Government has a choice originally. I think, since the Attorney General is charged with bringing these prosecutions, and of making the choice as to where he shall bring them, that that is properly his office, and if he conducts it in a reasonable manner, and has reasons for his action, no court should question them.

That was the view of the Court adopted in the case of the United States versus Bryson, which I have cited to Your Honor in the little memorandum we filed some couple weeks ago. In that case, which is the only case we have been able to find in Federal Jurisprudence subsequent to the rules where an indictment was brought subsequently in a second district and the Attorney General moved to dis- [fol. 98] miss in the original district. In that case the

Court said that that was within the power and responsibility of the Attorney General, and having given the Court what appeared to be a good reason for that, then the Court would grant leave as a matter of course to dismiss the indictment, and we submit that as a proper guide for the action of the Court here.

As the Court has already probably seen by the Advisory Committee notes to Rule 48-A, in U. S. Code Annotated, up until 1948, the adoption of these rules, it was generally held, beginning with the Supreme Court decision in the confiscation cases and later in the Woody case, and other cases, that the prosecuting officer, the United States Attorney, or Attorney General, had unlimited power to dismiss an indictment at any time. That was the rule as the advisory committee note says, and it was an innovation on the practice existing when the rule was written to require leave of the Court to be granted.

Now, we submit that that was not intended to transfer any of the functions of the Attorney General to the Court, but was merely to give the Court control over the entries made in his docket in the disposition of cases, which it has in all other instances, making it consonant with practice [fol. 99] under other rules and other situations both in criminal and civil law, and the decisions subsequent to that, in U. S. versus Bryson, it has been a universal practice of the courts in dismissing the indictment on request and authority of the prosecuting officer, shows this has been the interpretation of the courts.

In all of the federal cases before and after the rules, we have found only two cases in which the Court refused to grant leave to dismiss an indictment. One was before the rule, and the other was after the rule.

In the Krakowitz case, because there was a situation where the Court—where the defendant plead guilty to one count, and the Court did not believe that that was enough, and did not allow the prosecuting officer to dismiss the indictment as to the other counts, because the Court felt that the defendant would get off too lightly, and the prosecuting officer should try the defendant on other counts on which it appeared that he was likewise guilty. Of course in that case it was entirely satisfactory to the defendant.

He raised no objection, and of course in that case there was no other indictment for those other counts. That was before the rule, and that was the Krakowitz case.

[fol. 100] And then in the one case, a Connecticut case, U.S. versus Doe, there a plea of guilty of one defendant was conditioned upon the dismissal of indictments against two other defendants, and the Court felt that this was inequitable and unjust, and that the plea of only one man, one defendant, should not be conditioned on the dismissal of others, and therefore refused to approve this arrangement entered into by the United States Attorney and the defense attorney.

In those two cases, you see, Your Honor, the matter was entirely satisfactory to the defense and to the prosecution, but it did not appeal to the conscience of the Court, in both instances, once before the rule and once after the rule, so the Court in both instances refused to allow the dismissal. In each case, of course, if there had been another indictment pending against the people against whom the dismissal was sought, then the Court would have been satisfied, because the prosecution would have been maintained, and that was the objection of the Court to the dismissal.

There is one other case that we feel is relevant and should be called to the Court's attention, and that shows—and it was a case in 1944, just before the rules, and it is Judge Atwell's decision in the case of the United States versus [fol. 101] Great Atlantic and Pacific Tea Company. In that case the record shows that the defendant not only had no legal right to object to the dismissal, but also that he has no—what might be termed—no equitable right either to dismiss. In that case, the defendant did not object to the dismissal of the indictment, urging that he had been put to great expense, trouble in preparation for trial, and the case had actually been set for trial, and the parties were on the verge of going to trial when the United States Attorney was instructed by the Attorney General to dismiss the indictment.

Judge Atwell considered that matter and said it was within the power of the Attorney General to dismiss the indictment, and he did not see, under any authority, where any trouble, inconvenience, labor or expense the defendants might have been put to in preparing their defense was any

bar to the power of the prosecution in dismissing. That was before the rules, but we think that applies as a good precedent for after the rule as well.

Now, in all these cases then, Your Honor, the dismissal has been allowed where another indictment was pending, and the defendant has been given, or is not given, I mean, by the rule, any power to object.

[fol. 102] To remove any question about the equity of what the Government is doing here, although Judge Atwell said the defendant had no right to raise that objection, we have agreed and stipulated in the memorandum filed, which is signed by the United States Attorney in the Western District as well as myself and Mr. Dowd, we have agreed that in the Western District, if the defendant desires orders consonant with the decree of this Court on the questions of discovery, inspection of documents and bill of particulars, orders entirely identical with these orders here, may be entered in the Western District, if the defendant desires. Now, of course if the defendant does not desire, in the Western District, to have these same orders, he will be free to raise again any motions which he has raised in this Court, or any others that he desires also, but we have agreed with the defendant, or we have stipulated that we are ready to agree and submit such orders for Judge Rice's consideration in the Western District, in order that there will be no delay in the prosecution of this case, and in order that the labors of defendant's counsel will not have been wasted, and in order that the matter may proceed just as if it were in the Southern District of Texas, and that the defendant will not in any way have suffered any injury [fol. 103] or expense from the consideration of these motions here.

We do that also to stress that the motive of the Attorney General in placing this in the Western District is not to evade the effect of the orders here already entered in the Southern District of Texas. Now, on that point I was handed at about twenty minutes of ten a memorandum submitted by the defendant on this matter. I have not read it entirely, but in scanning it I notice that the defendant lays great stress on these two points, first that it is within the power of the Attorney General to do what we have done here, and secondly, and that is what the defense has offered,

that it is an evasion of the Court's order transferring venue. We want to urge in all sincerity that the order transferring venue was one of several factors which the Attorney General considered in re-evaluating the position the prosecution would find itself in in the Southern District and the position the prosecution would find itself in in the Western District.

Those I have outlined, the change in the prosecutive staff there, where for twenty years all income tax cases have been tried; the question of witnesses, the question [fol. 104] of jurors, the question of newspaper publicity.

It has been the desire of the Government, and I think Your Honor has found it reflected in our replies to defendant's motions, to secure a trial in this matter in an area where it can be judged as a judicial proceeding, and where the jurors and persons participating therein will be in a court of law, and not in some headline drama every day, and every night.

We have noted carefully that in Your Honor's opinion on the change of venue, Your Honor has said that he had no power to move this case outside of the Southern District of Texas under the terms of defendant's motion. Your Honor, in another place, further stated that as the Court construed its powers, it had no power to order this case transferred to Houston, Galveston, Victoria or Brownsville in the Southern District of Texas, but only to transfer it to Laredo or to leave it at Corpus Christi. Those were the only two places which the Court considered it had power to place the trial of this case.

Your Honor, the Attorney General has the power to bring an action in the Western District, and the Attorney General has exercised that power. The Attorney General has placed the cause of United States versus Parr in the Western [fol. 105] District. That was a power which the Court did not have on the motion for change of venue, and it was a power which has always been considered to reside in the Attorney General and prosecuting authority.

Therefore, Your Honor, we submit that if the reasons of the Attorney General, any one of them, appears sound, or if they appear to you to be in good faith, and they appeared sound to the Attorney General, then in his discretion, as the chief prosecuting officer of the Government, then

he should be allowed, as has always been the case, to exercise his right to dismiss in the Southern District of Texas and continue the prosecution in the Western District, as was done in the United States versus Bryson.

We feel that for the Court to refuse leave, to refuse to grant this leave to dismiss, would be to impair the Attorney General in the due excercise of his responsibilities, and would put upon the Attorney General a restriction which the Supreme Court did not see advisable to put in Rule 48-A itself when it was adopted in 1948. Therefore, Your Honor, we respectfully move the Court to dismiss the indictment in the Southern District of Texas.

PRESENTATION BY DEFENDANT

Mr. Looney: Your Honor, we would like to supplement [fol. 106] this record with a short piece of oral testimony.

The Court: Call your witness.

Mr. Looney: Thank you. I would like for Mr. Wilkey to come as a witness, and we waive the oath, Your Honor, so far as I am concerned.

Mr. Wilkey: Your Honor, we, of course, are here, Mr. Dowd and I, to answer any questions about this which the Court may direct to us, but as a matter of law, under Rule 48-A, the defendant here has no standing to object to the entry of this dismissal order. Now, that does not mean, and we would not imply, that the Court does not have the right to hear whatever argument counsel may want to offer for the edification of the Court, or, in fact, to hear affirmative testimony to supplement that, if he wishes to bring that out, but we do think that under the rule that it is going a little further than making an argument to the Court in filing briefs for the Court's edification to call the United States Attorney and interrogate him presumably about matters which would be within the confidence of the Department of Justice.

The Court: I repeat, counsel, that the wording of the rule contemplates that there is some—I don't know how much—discretion with the Judge of the Court. In excercising that discretion, I think I ought to have the facts. [fol. 107] If the defendant in the case has any facts he wants to present to me, whether from the District Attorney

or otherwise, in the exercise of that discretion, if I have that discretion, I think I should hear it, and I see no objection to your testifying as a witness.

Mr. Wilkey: Subject to our objection, Your Honor, and any objections which we might want to make to specific questions, I will be glad to take the stand.

The Court: All right.

Mr. Looney: Your Honor, last week, through my associate, Mr. Collie, I made known to Mr. Wilkey, through Mr. Dowd, as I understand it, that we might have a few questions, and also asked them if they would have available today the '49, '50 and '51 income tax returns that were filed by the defendant and I understood from my associate that Mr. Dowd said they would be here.

Mr. Dowd: May it please the Court, Your Honor, photostatic copies are here.

Mr. Looney: That is all right.

Mr. Dowd: And, Your Honor, we agreed to bring the copies in at the defendant's request in lieu of their serving us with a sufficient subpoena, and of course we reserve all [fol. 108] of our objections to what they might want to do with these.

Mr. Looney: If you will just hand them to the witness, I don't particularly care to even look at them, Your Honor. I think there is some information on there that is material to this hearing.

The Court: So that we can understand what the objections are, they are the same ones that counsel just related?

Mr. Dowd: Yes, Your Honor.

The Court: All right.

Mr. Wilkey: Mr. Dowd, the second envelope there contains duplicate copies that belong to Internal Revenue. You may want those.

The Court: Of course counsel understands that I am allowing the District Attorney to be questioned, and am ruling on it in principle. You may ask him questions that I do not think are admissible, and in that case I will rule on it. You may proceed if you desire to do so.

Mr. Looney: Your Honor, it has been so long since I have had the privilege of appearing here, I don't know

whether it is the rule for counsel to examine witnesses sitting or standing in your court.

The Court: Sitting.

[fol. 109] Mr. Looney: Thank you, Your Honor.

MALCOLM R. WILKEY, of counsel for the Government, being called as a witness in behalf of the defendant, the swearing of whom was waived, testified as follows:

Direct examination.

By Mr. Looney:

Q. You are Mr. Malcolm Wilkey?

A. Yes, sir.

Q. United States Attorney for the Southern District of Texas?

A. Yes, sir, that is correct.

Q. And have been since when?

A. March 17th, 1954.

Q. March 17th, 1954, and Mr. Dowd is your assistant?

A. That is right.

Q. And has been for what length of time?

A. For about—he has been my assistant since March 17th, 1954. He was appointed an assistant some time prior to that. I think he has been there about two years.

Q. Now, Mr. Wilkey, at my request you hold, do you not, certified photostatic copies of the income tax returns of George B. Parr as they appear on file with the first collector, first the collector of the First District, for the years 1949, 1950 and 1951?

A. I do not think these photostats are certified, but they [fol. 110] are photostats of the returns which I am informed by the Internal Revenue are on file in the Internal Revenue office.

Q. All right, that suffices for my purpose. We are both willing to stipulate here before the Court that they are true copies of the returns on file?

A. To the best of my knowledge, that is correct. That is what I asked for, and that is what I have been furnished.

Q. I will ask you first about the 1949 return. Is it a fact that that return shows it to have been prepared by a Mr. Benson?

A. Yes, W. M. Benson.

Q. Is it likewise shown to have been deposited in the Corpus Christi office of the collector for filing at Austin?

A. That is correct. It is stamped "Received, March 15th, 1950."

Q. Is it a fact further that the evidence available to you is that it was prepared and caused to be prepared by the taxpayer, the defendant, in the Southern District of Texas?

A. Yes, the evidence available to us indicates that.

Q. All right. Now, without going into—if it is agreeable with the Court, without going into detail as to the 1950 and [fol. 111] '51 returns, if the same questions should be asked you as I have just asked you with respect to the 1949 returns, would your answers be the same?

A. That is correct. The return shows to have been prepared by W. M. Benson in each case, and to have been deposited either on March 15th or 17th in the Corpus Christi sub-office.

Q. And the other answer that you gave with respect to the 1949 return, with respect to it having been prepared and caused to be prepared by the defendant in the Corpus Christi Divisions of the Southern District of Texas, that testimony is likewise available to you?

A. That is correct.

Q. Now, Mr. Wilkey, then any risk that you might encounter in trying this case on the first indictment, to-wit, the one returned by the grand jury in the Southern District in November, 1954, that same risk obtained at that time as obtains at the present time?

A. That is true, but as I stated to the Court a few moments ago, and as I stated in the memorandum filed some two weeks ago, the question of proving venue in the district of taxpayer's residence is only one of the many factors which the Attorney General must consider at the time he [fol. 112] places the case in the hands of a United States Attorney for trial. Presumably in this case that was one of the factors considered, and it is a factor which gives difficulty sometimes in the proof of the Government's case, and it is a factor which, if other things are equal, apparently has for the last twenty years caused the Attorney General to file all of his tax cases in Austin.

Q. Begging your pardon, Mr. Wilkey, but would you be good enough just to give a direct answer to my questions,

and then let your assistant develop any explanation you have on cross? I think it would expedite the matter.

What I am getting at is the question which I think could be answered "yes" or "no." You have no greater risk? There is no greater risk in so far as the venue allegations are concerned at this time than there was at the time the matter was presented to the grand jury last August and the indictment returned, and at all times subsequent to that, up until April 28th? That's true, isn't it?

A. It is true that there is no greater risk in regard to venue proof now than there was then, nor did I indicate in my statement to the Court and in my memorandum that there had been any change at all in this venue risk. I [fol. 113] merely pointed out that this was a risk inherent in the Government's case, and which normally, here in Texas for the past twenty years, has caused the Attorney General to present the cases in the Austin District, but in this case, for reasons involving other factors, and I discussed at least four of those other factors, the Attorney General decided last August to present it here in Houston for trial in the Corpus Christi Division. I at no time in my statement, written or oral, intimated to the Court that there had been any change in the venue proposition. I merely called attention to the fact that this was a risk inherent in the Government's case which the Attorney General normally tried to avoid.

Q. Begging your pardon again, please, Mr. Wilkey, we will expedite matters if you will be kind enough to respond and give an answer without an argument.

A. Mr. Looney, I certainly don't intend to argue with you. It has always been my understanding and position that a witness should first answer a question directly, and then if he has any explanation to make, then he makes his explanation. That is what I tried to do.

Q. All right. Then we will go to the next point. As to [fol. 114] the proof of venue, the Government's responsibility to prove venue wherever the cause might be tried, there is no fact now known to you which was not known to you previous to the returning of the indictment in the Southern District, which would place any additional burden on the Government to prove its venue allegations? Isn't that true?

A. Yes, in all frankness, there is, and I do not wish to go into the strength or weakness of the Government's case, Your Honor, with opposing counsel here, but the very fact that the case in the Southern District has now been transferred to Laredo and the fact that testimony will have to be elicited from witnesses who are either reluctant or hostile makes—throws a little different light on the Government's proof of venue, as it does on the Government's proof of other aspects of the case. I point out to you in that regard that Mr. Benson here, who was in the employ of Mr. Parr and signed the tax returns, was an employe of Mr. Parr, and he has lived down in that area. Not going further into the case, but the change in the location affects the proof as to venue as it does the other facts of the Government's case.

Q. Now, Mr. Wilkey, begging your pardon again, once again, please, sir, you have available to you the same evi-
[fol. 115] dence to show venue at this time as you had prior to the bringing of the indictment in the first instance in the Southern District, that is true, isn't it?

A. Theoretically, yes.

Q. Now, no theory to it, isn't it actually true?

A. As far as the basic facts are, we believe them to the same; as far as the practical problem of proof in a lawsuit, the scene has been altered, the situation has been altered considerably by the shifting of the case from Corpus Christi to Laredo.

Q. That once again—your last statement indicates your displeasure of the moving of the case from Corpus Christi to Laredo, your displeasure as to that only, isn't that true?

A. I think it has been very clear from several documents we have filed that we would have preferred the case to remain in Corpus Christi, and it is certainly clear from the action of the Attorney General and myself that the Attorney General prefers that the case go to Austin, and believes, in the exercise of his office as the chief prosecutor, it ought to be prosecuted there in Austin.

Q. All right. Now, you do not say, do you, Mr. Wilkey, that there is any less proof or less witnesses available to you to show venue in the Southern District of Texas at
[fol. 116] this time than there was prior to the time and at the time the grand jury in Houston returned the bill of indictment against this defendant in the Southern District?

A. I do not say that the basic facts have changed. I do say that the practical problem of the Government prosecutor in making proof has been altered, and I further point out that I did not list a change in our venue situation as having occurred. I merely listed it as an inherent difficulty in the Government's case in prosecuting anybody in the Southern District of Texas who files his return at Austin. It is not our contention that the facts have changed. Our contention is that the changes occurred in the prosecutive staff, in the panel of jurors before which we will be expected to try the case, probably in the attitude of some witnesses and the effect of newspaper publicity, which may have an adverse effect on the defendant as well as the prosecution.

Q. Now, Mr. Wilkey, you have mentioned that newspaper publicity. Isn't it a fact, and don't you know it to be a fact, that the only publicity attendant upon this case was obtained by the newspaper men from either the court files or from someone on your staff, and not one single statement has appeared in the paper with respect to this case from [fol. 117] the defendant, emanating from the defendant or his counsel. Isn't that a fact?

A. I have in no way intimated that this newspaper publicity was derived from improper sources, or was something in itself that was improper. I merely mentioned it as an existing fact, and that, I think, is influential on the consideration of what kind of a trial the Government and the defendant will get at the various places. I think it has some bearing on the Attorney General's decision to place the action in Austin.

Q. You have not yet answered my question, Mr. Wilkey, if I understand you. What my question to you, stated in another way, was, you have not seen a line of newspaper publicity with regard to this transaction, either at the time it was being investigated by the grand jury or subsequent thereto, that emanated either from the defendant or defendant's counsel, have you?

A. No, I have not, nor have I from the prosecution counsel. It has all been derived from the mere filing of papers in the court records, and the actions taken by counsel in open court, and therefore the same could be expected on the trial of the case. Neither defendant counsel nor the prosecution counsel would need to make any statements to at-

[fol. 118] tract the attention of the newspapers to this case. It would simply be the inescapable result of the case taking place in Laredo or Corpus Christi, or Brownsville, or anywhere along the border there. I have not in any way intimated that you or other counsel, or ourselves, were responsible for the publicity. It is just a fact.

Q. Now, you don't intend by that statement to infer that there has been any character of publicity whatsoever in any paper in Laredo adverse to the Government's position in this case, do you?

A. I am not talking about——

Q. Now, please, just answer that question, and then give your explanation if you will.

A. All right. I don't know that there has been any publicity adverse to the Government's case anywhere. I do know that there has been publicity, and I do know where it has been intensified, and it is on the basis of the perfectly legitimate interest that the publicity has arisen in those ways, and it is that fact, not that it is favorable or unfavorable to the Government or the defendant, that I brought before the Court for its consideration.

Q. Now, isn't it a fact, and don't you know it to be a fact, Mr. Wilkey, that there has been less publicity about this [fol. 119] case in the papers circulated at Laredo, with the exception of the small circulation of the Corpus Christi Times that is going down there, and the Liberto publication which I mentioned in some previous briefs in pleading before the Court, that there has been less of it in Laredo than any place within your knowledge, any of the places now under discussion?

A. By places under discussion, you mean what?

Q. I am speaking of Austin and Laredo.

A. No, to me all of the information in the papers I have seen, there has been more in Corpus Christi, Laredo and Brownsville than anywhere else, and I think it perfectly logical that that be true, because the defendant lives in about the center of a triangle around which those three cities are located, and on the basis of the papers I have seen, there has been more publicity in those three spots than here in Houston or anywhere else.

Q. More publicity in those three spots than Austin or Houston or anywhere else? That is your statement?

A. Yes.

Q. Have you ever seen any of the issues of the Austin papers that came out since this investigation first started with the Houston grand jury?

[fol. 120] A. I think I have. I certainly do not read the Austin papers intensively, but I have seen them.

Q. All right.

A. And I assume that if there has been any publicity adverse to your client in the Western District, you can bring that to the attention of the Court over there.

Q. Yes, sir, and we are going to get around to that. Now, Mr. Wilkey, who initiated this motion, this sequence of events, which led up to your motion for leave to dismiss this indictment?

Mr. Dowd: Excuse me, Your Honor. I think that we may have a valid objection here. If I understand Mr. Looney's question that by who initiated, is he trying to eventually come around to what types of discussions took place between this office and the Attorney General's office in Washington, or whether the dismissal actually started, or to use your word, was initiated here or in Washington, why, I believe that is a confidential matter Your Honor.

The Court: Read the question, Mr. Court Reporter, please.

The Official Reporter (Reading): "Now, Mr. Wilkey, who initiated this motion, this sequence of events, which led up to your motion for leave to dismiss this indictment?"

[fol. 121] The Court: It strikes me that that objection ought to be sustained. What do you say about it?

Mr. Looney: Your Honor, in his argument, which was not testimony, counsel stated to the Court, if I understood him, or placed the responsibility for this motion for leave to dismiss on the Attorney General as a point of origin of the sequence of events that led up to it. I think it would show or shed light on this matter whether they became alarmed at Washington or whether it was merely the result of the alarm or dissatisfaction of the United States Attorney, and he merely secured permission to take steps such as he took on his own initiative.

The Court: The objection is sustained.

By Mr. Looney:

Q. Now, Mr. Wilkey, it is a fact, is it not, that the Attorney General of the United States, as you say in your reasons for dismissal, has designated Mr. Dowd as a special assistant to the Attorney General for the purpose of prosecuting this case in the Western District of Texas, in the event such a prosecution is had in that district?

A. That is correct.

Q. Now, that could have—that same procedure could have been followed by the Attorney General prior to the [fol. 122] submission of this case to the grand jury in the Southern District, could it not?

A. It would have been very unusual to have initiated a prosecution in the Western District and designated a man then an assistant in the Southern District to prosecute the case, when the man in the Southern District had no knowledge of it any more than anybody in the Western District. It is simply because Mr. Dowd has devoted a large part of his labors since last August in the presentation and preparation of this case to the grand jury and other things that the Government does not desire to waste his time and effort already spent, and thus insures the continuity of the case. For him to start off originally in the Western District would have indeed been an anomaly, and the United States Attorney there might very well have protested.

Q. Now, Mr. Wilkey, this anomaly that you speak of, isn't it a fact that, or do you know it to be a fact, or is your acquaintance with the procedure that ordinarily obtains in an income tax fraud case, if you have any information or opinion, don't you know it to be a fact that in those character of cases, in cases involving the Sherman Anti-Trust Act and the Clayton Act, that the usual procedure is for the Attorney [fol. 123] General to designate somebody especially to come down into the district and have charge of the prosecution, rather that it being an unusual procedure?

A. My knowledge of what has been done in the Austin District in the past few years is that that office over there has handled its own income tax prosecutions. I do know that at the present time the Department of Justice has sent a lawyer down from the tax division to work with Mr. Rus-

sell Wine, the United States Attorney, in the presentation of cases coming to the Austin term this next June, but that is because Mr. Wine and his staff have not had any previous experience in the trial of tax cases, and I may be wrong—I am not fully informed,—I understand that that is a rather unusual situation, derived from the change, the complete change, of the entire staff there in the Western District.

Q. Mr. Wilkey, please, in the interest of time, confine your answers to my questions. Now, do you know who is the acting head of the Criminal Fraud Section of Anti-Trust Department of the Attorney General's office at this time?

A. Of the Anti-Trust?

Q. No, of the Tax Fraud Division.

A. I think in the set up, that is Mr. Mitchell.

[fol. 124] Q. John Mitchell?

A. I believe so.

Q. Don't you know it to be a fact that when Mr. Herring was United States Attorney of the Western District in Austin, Mr. John Mitchell, not on just one occasion, but on several occasions at the request of the Attorney General to investigate and prosecute cases in that division?

A. That may well have been true on some instances. I am not acquainted with that.

Q. All right.

A. From reading the papers, I would judge that in most cases Mr. Herring and his staff prosecuted their own cases there.

Q. Did you ever know Mr. Holmes Baldridge?

A. No, I am not acquainted with him.

Q. For your information for a number of years he was an assistant attorney general in Washington in the Anti-Trust Division. Do you know whether or not he has on more than one occasion been in the Western District in connection with prosecutions of the Sherman Act and the Clayton Anti-Trust Act?

A. I do not know, but I would not be surprised because the Anti-Trust set up in the Department of Justice is entirely different from the tax or other set up. No United [fol. 125] States Attorney prosecutes anti-trust violations. They are all prosecuted by the Anti-Trust Division of the

Department of Justice, which has some two hundred and forty-some-odd lawyers in that department. Our office here, we refer all anti-trust matters to that department.

Q. Let's confine it to the question, Mr. Wilkey. Let's get back to my question, Mr. Wilkey, which is a question I have been trying to get an answer to for some time. The Attorney General could have as easily, last year, before the Parr case was laid before a grand jury in the Southern District of Texas, could have easily designated Mr. Dowd or anyone he might have wished as a special assistant to the Attorney General for the Parr case in the Western District, he could have as easily done it then as he did it the other day?

A. He could have done it then——

Q. All right.

A. —but the reason—I understand the reason he did it the other day was because Mr. Dowd has spent months and months and months in the preparation of the case——

The Court: I think that is perfectly plain to us, that if it goes to the other district Mr. Dowd ought to go with it.

[fol. 126] Mr. Looney: Yes, that is my point. I don't think I have any further questions of this witness.

The Court: Have you any questions?

Mr. Dowd: No, sir, I don't believe so.

The Court: Stand aside. Are there any other witnesses?

Mr. Looney: No, sir, no other questions. I have some matters, Your Honor, that I would like, if it is necessary to do so, to ask the Court, as to this hearing to take judicial notice of the proceedings that we had on the motion for change of venue, and the filed documents in that matter, including those filed by the defendant and by the Government, and that memorandum filed by this Court dated April 27th and filed April 28th, the memorandum of this Court, and the Court orders. I don't think that request is necessary, but I do ask the Court to take judicial notice of those.

The Court: Is there any objection to that?

Mr. Wilkey: No objection, Your Honor.

The Court: It will be so regarded then.

Mr. Looney: With Your Honor's permission I would like to present some argument now.

The Court: All right, suppose we take a recess of about [fol. 127] ten minutes, and then we will hear your argument.

Mr. Looney: Very well, sir.

(Ten minute recess.)

CONTINUATION OF PRESENTATION BY THE DEFENDANT

The Court: You may present your argument for the defendant.

Mr. Looney: Your Honor, the events, all of them, leading up to this hearing occurred with the same United States Attorney——

The Court: Counsel, would you mind coming up to the clerk's desk? I can hear you better.

Mr. Looney: I will be glad to, Your Honor.

All of the events, Your Honor, occurred with the same United States Attorney, acting under direction of the same Attorney General, in charge of the prosecution of this case. They had a choice between the Southern District and the Western District, as he says. I said they had a choice. They selected the Southern District for the place of prosecution for reasons, I am sure, sufficient unto themselves. They remained, in so far as any writing, or word, quite pleased with their selection down to and including the motion stage in this case, in this district, including the motion on the controversial venue question. Not one time, if Your [fol. 128] Honor please, and I have reviewed the papers that they have filed in connection with the venue question again since this came up, and not one time in there did the United States Attorney indicate any troubles if this Court would send the case to Victoria, Galveston or Houston. His only objection was to Laredo. Five days after——

The Court: It seems to me there was some suggestion that it might well be sent outside of the district.

Mr. Looney: That is correct, Your Honor. Suggestions even to that extent, and with no fear of any additional risk, or no fear of any additional burden being cast on him in proving the venue allegations, but five days after the Court's April 27th memorandum, filed on April 28th, the United States Attorney appeared in San Antonio and secured an indictment at the hands of a grand jury impaneled there

for the Western District, and immediately filed his motion for leave to dismiss this indictment.

Now, in the few questions that I have asked counsel, and I think it is demonstrated, Your Honor, that his only fear of the venue in this case is prompted by his fear, real or fancied, of the place, Laredo. He said he has the same proof available to him, the same risk was inherent in the matter [fol. 129] back before the indictment was returned in the Southern District, so actually it boils itself down, Your Honor, to the fact that the United States Attorney just doesn't like to have the case at Laredo.

The two indictments are identical, as he says, with the exception of the venue allegation, and in the venue allegation the San Antonio indictment merely drops out those venue allegations in the indictment which fixed venue in Corpus Christi, or in the Southern District.

I would ask, and have asked, does he represent that there is any risk necessarily inherent in any prosecution in the Southern District, and that was his language in his reasons for dismissal, that did not exist when the indictment was returned in the Southern District, and he said so. Furthermore, I asked if there was any burden, any additional burdens, that had arisen since bringing the indictment in the Southern District of Texas as to venue that did not exist prior to the time the indictment was returned in the Southern District, and he said no. He does work himself back around to the notion though that he doesn't like Laredo. There is something about Laredo that just doesn't suit him.

So he can't say that since this case was filed there has [fol. 130] arisen a doubt as to the venue being in Corpus Christi. He doesn't say that. He is not afraid the venue is not properly in the Southern District. He doesn't say that now, and I emphasize that for the moment because when we get to the Bryson cases—not case but cases. I believe I can point out to the Court where that is of importance in considering this.

As I said a moment ago, in every paper that he filed in connection with our motion for change of venue, opposing it, not only did he not say that there is some risk and burdens about the Southern District that the Government ought not to have to go to in the way of venue, but he categorically

in each instrument he filed said, "We will be glad to have it moved to Houston, and Houston is in the Southern District; we will be glad to have it moved to Galveston, and Galveston is in the Southern District; we will be glad to have it moved to Victoria, and Victoria is in the Southern District, and we would be even glad to have it moved outside of the district."

So actually, Your Honor, I can't help but believe that these so-called reasons are pure unadulterated sophistry. [fol. 131] He won't tell Your Honor that had Your Honor overruled the defendant's motion for change of venue that he would have never the less have moved to dismiss this indictment. He hasn't told you that; he wouldn't tell you that. If he should, Your Honor, and he hasn't and he won't, he would be putting himself in the ridiculous position of saying in this Court that we have taken up the time of Your Honor, and, of much less importance, of course, the time of counsel for the defendant, to consider the proof and to consider the law on the venue question, notwithstanding which Your Honor, even if you had overruled the motion to transfer venue, we would have come in Court and dismissed the case, or attempted to dismiss the case. He hasn't told you that, and he won't tell you that.

Now, Your Honor, up until 1946 when the Federal Rules of Criminal Procedure were adopted, the Attorney General of the United States, or the United States Attorney, acting under the Attorney General's direction, had the absolute unequivocal right to come in and just file a dismissal. It is true that in some instances rather than just file a dismissal, they would ask the Court to sanction it, as was the case, the thing that happened in the Krakowitz case which we shall come to, and the thing that happened in the Great Atlantic [fol. 132] and Pacific Tea case, Judge Atwell's case, which we will discuss later. To try to lend a little bit more to, to try to lend some judicial sanction to their act, they at times came in and asked the Court's sanction, and that has been discussed in the oral reviews and various proceedings with respect to the various amendments to these rules to do that, but there was a great deal of dissatisfaction that arose in a great many districts, Your Honor, on the part of the United States Judges, and it even reached the Supreme Court of the United States, about that rule which permitted a United

States Attorney to just come in and ipsi dixit dismiss a case.

Now, the Honorable Leon Yankwich, before whom I have had the pleasure to submit some matters in California, a very able judge, a very able writer, he delivered an address, Your Honor, at the Judicial Conference of the 9th Circuit in San Francisco July 4th, 1941, on this subject matter, when the judges were advocating, and lawyers were advocating, the law teachers were advocating a change in the rules so as not to give the United States District Attorney unbridled discretion in a matter like that, and that paper he presented to that conference is reported in 1 Federal Rules [fol. 133] Decisions, Page 746, and he was advocating the adoption of the rules vesting in the Court control over discontinuances and dismissals, by the rule setting up the procedure. It was five years before it was adopted, when he said these words, and I am quoting from what he said: "If at all, there is any greater need for discretion in that field and elsewhere. For the quality of criminal justice depends, to a great extent upon the Judge. Ultimately both the prosecutor and the attorney for the defendants are partisans. In the old phrase, it is the function of the Judge 'to hold the balance nice, clear and true,' between the Government and the defendant. He is the guardian of the constitutional rights of the accused. He is the representative of society to see that justice through law is achieved. I believe," said Judge Yankwich, "that the achievement of this goal will be made easier by clothing the District Judge with full discretionary power in the matter of dismissals or discontinuances in criminal cases."

And earlier in the same address, when Judge Yankwich used the term, "discretionary," he pointed to what he meant by "discretionary," by taking the definition from Bouvere's law dictionary, and he said in his argument, "and by that a discretion means a decision of what is just and [fol. 134] proper in the circumstances."

Mr. Justice Frankfurter has said that in the administration of the criminal law reliance must be had, and I quote his words, "on the learning, good sense, fairness and courage of the Federal Trial Judges."

Defendant is, of course, aware of the fact that there is no legal inhibition against a man being indicted for the same offense in two courts of coordinate jurisdiction. However,

in upholding such double indictments, the Courts have been careful to note that the practice is not favored and should not be employed unless there is some good reason for doing so. Thus in the case of United States versus Haupt, 152 Federal 2nd, 771, the Court said, and this is by the Court of Appeals for the District of Columbia, a decision handed down in 1945: "Our conclusion is that the grand jury may return several indictments against the accused grounded on the same criminal act. The pendency of an indictment against the accused, where defendant has not been placed in jeopardy upon it, does not prevent a later valid indictment against him. Generally speaking, the pendency of a previous indictment is not ground for quashing a second [fol. 135] indictment, although it is discretionary with the Court to require the Government to elect upon which indictment it will proceed. A few of the cases bearing on the subject are collected in the margin."

Here is what the Court said then:

"The practice is not commended in the ordinary case."

Again, in United States versus Jones, 7 Alaska 378, a Federal case decided in 1926, it is said:

"While the practice of initiating a criminal action in one Court having jurisdiction and dismissing it and thereafter bringing the action in another Court of concurrent jurisdiction for the same crime is strongly to be condemned, yet there may be cases where the lack of evidence or defect in the complaint would influence the prosecution to dismiss."

Now, the reasons for his motion for dismissal contained only one stated reason. He said there were other factors, but he only stated one of the four in his argument, and I want to digress for a moment from my prepared matter to take up that matter of the reasons that had been suggested in his written reasons.

He says Charles F. Herring was anticipated being replaced, and his entire staff was replaced. Not that it makes any difference, if Your Honor please, but he is in error there, because there is one of the assistants—not at El [fol. 136] Paso, but at San Antonio—serving under Mr.

Wine, the new District Attorney, that was serving under Mr. Herring. That, Your Honor is an afterthought on their part as a reason.

Victoria was all right, Houston was all right, Galveston was all right, a completely new district was all right, until Your Honor entered his memorandum.

Mr. Dowd, or some other person, the District Attorney designate, the United States Attorney at San Antonio is Mr. Russell Wine, and he was the United States Attorney designate for a number of months before Mr. Herring resigned, before Mr. Wine replaced Mr. Herring. Everybody in the Western District knew it. I don't know whether the information creeped over here in the Southern District or not, but everybody knew he was the District Attorney designate way before the matter was ever submitted to the Houston grand jury here in the Southern District. He could have been deputized. He could have been specially deputized. There is no valid reason, there is no reason, if Your Honor please, that, in my motion, that is valid for this unprecedented procedure.

He said this, Your Honor, and this to me—he says that [fol. 137] the ruling of this Court, referring to the April 27th ruling, established a set of circumstances which was never in contemplation of the Government counsel at the time the original prosecution was brought in the Southern District of Texas. That is to say he said it was never in contemplation of Government counsel at the time the matter was submitted to the grand jury in the Southern District that the case, if the indictment was returned and it was placed in Corpus Christi, where it had to go under the indictment as returned, it was never in contemplation, says he, that a motion might be filed to change the venue.

Now, Your Honor, I have only this to say about that argument. I don't believe that the United States Attorney, or the Attorney General either, is charged with any less knowledge of the law than an ordinary citizen.

Rule 21-A had been on the books since 1946, when the Federal Rules of Criminal Procedure were adopted. How can he be heard to say that the U. S. Attorney or the At-

torney General, or both of them, that we could not, that it was not in our contemplation, that the case might be transferred from Corpus Christi if grounds were shown for such transfer, to Laredo. I say to Your Honor that he was charged, and properly so, with knowing, when [fol. 138] they brought the indictment and made their election to bring this case in the Southern District that Rule 21-A gave the defendant grounds to move to change the venue, if so great a prejudice existed in that district as the Court might feel that he could not obtain a fair and impartial trial.

It is hard to believe that the Attorney General or the United States Attorney, either or both, would make any claim of that kind to a Court that they could not, or that it was not in their contemplation that that might have happened.

The whole reason for the argument of Mr. Wilkey today is that the Government does not like Laredo for the forum for the trial of this case, but Your Honor, in his April 27th memorandum, said, "Basing my findings, as I must, wholly on the affidavits, I do not think that the evidence shows that the Government either will or might 'be under a severe handicap' in the prosecution of this case as claimed. I find to the contrary."

So this Court has set at rest that figment before he expressed it in this latest document he filed.

We say to you, if Your Honor please, there may be such a case, but we have found no reported federal decision where [fol. 139] the United States Attorney, after the Court in which the first indictment was filed, had changed the venue under the rules, either 21-A or 21-B, that subsequently he came back and asked for and obtained an indictment in another district of concurrent jurisdiction and then come in and move to dismiss the first indictment, as he does here. There is no such case. The effort may have been made, if Your Honor please, under facts and circumstances such as these, but if the effort was made, the decision was not reported so far as we have been able to find.

Now, Your Honor, just let me digress a moment. The Court is familiar with 21-B, where the Court may, if he feels that justice may be done, transfer a case from the

district in which it is pending, or the division in which it is pending, to another division or another district, with concurrent jurisdiction, if he feels that justice will thereby serve.

Let's apply what happened here to the situation there. Supposing this case—that is on motion of the defendant also—supposing this case, that this case had been transferred on a motion under 21-B, rather than 21-A, to the Western District, the Austin Division, on a plea by the defendant that justice would be best served there, and you [fol. 140] transferred it. Under the procedure that they are undertaking, Your Honor, all they would have to do, after you had entered such an order, is to go back and bring another indictment in the Southern District and move to dismiss the first indictment. That is all they would have to do. It is practically playing footsies with the Court there, or attempting to.

Now, we found no federal case on this, Your Honor, but we have found three decisions by the Courts of Last Resort of three states of these United States, with a rule, not verbatim, but practically and substantially just like the rule 21-A under which this venue was transferred to Laredo.

One of those cases is an Alabama case, decided in 1921, entitled Ex Parte Lancaster.

The Court: Is that a state court case?

Mr. Looney: A state court case, the Court of Last Resort in Alabama, where they had practically the identical rule with respect to venue. Here is what they say in that case:

"Neither the constitution nor the statutes of Alabama authorize the state to apply for, or to secure, a change of venue in any criminal case"—just as the rule is here—in the United States Courts, I mean—"Will the courts allow the State to secure a change of venue indirectly when it is [fol. 141] not permitted directly to do so? What cannot be done directly by law, the law does not permit to be done indirectly. No change of venue can be granted by a Court in a criminal case, except on application, petition or motion of the defendant. The defendant must be the moving party for the change of venue—and not the state.

"It is clear that, when the order of removal of the trial of this defendant from Walker to Marion County was

granted, jurisdiction in Walker County for this offense ended, and jurisdiction was given to Marion County Circuit Court. It is clear that the state cannot have the Court grant a change of venue. It is clear that the trial can be removed but once. Now can the state deprive the circuit court of Marion County of this jurisdiction to try this offense, by entering with the consent of the Court, a nolle prosequi in the case, and thereby transfer the trial back to Walker County?"

The Court: Did both countries have jurisdiction?

Mr. Looney: Yes, sir, and in this case, Your Honor, they had granted a nolle prosequi with the consent of the Court in the county to which the case was transferred.

The Court: What was the man charged with?

[fol. 142] Mr. Looney: Murder.

The Court: In which county?

Mr. Looney: In Walker County, is where the offense occurred and where he was first indicted, and it was on a change of venue that it went to Marion County.

The Court: How did they have jurisdiction in Marion County?

Mr. Looney: It was stated in here that the murder, the alleged murder, that both courts had jurisdiction of it. I don't recall the distinct fact, but the court says that either court had jurisdiction of it.

Now, this case even held, Your Honor, that—and I don't think that the courts of the United States would go as far as they did in this case, but in this case they just said you couldn't have another indictment even with the consent of the court, and it was the same rule.

"To give the state this right to have the trial transferred to Walker County would deprive the defendant of his right to be tried in Marion County for this offense. This would allow the state a change of venue, if permitted. This defendant cannot be deprived of this right to be tried [fol. 143] in Marion County by motion of the state for a nolle prosequi to be entered, which is granted by the court. Neither the constitution nor the statutes of Alabama ever contemplated that the defendant should be in that way deprived of his right of trial for the offense charged Marion County. To permit it, the state, with the approval

of the court, by entering a nolle prosequi, could accomplish indirectly what the statute directly forbids: Namely, a change of the trial of the defendant on the offense charged from Marion County to Walker County—or some other county, perhaps.

"The court cannot approve, or encourage, or permit such practice. It will set up no such precedent. It cannot permit a defendant to be liable to be harassed in that way."

Now, the same situation was in Mississippi. The Supreme Court of Mississippi decided this in 1904, and I quote briefly to the Court:

"The trial could not, on the application of the state, have been transferred to any other county because this is not permitted by law, and the method here adopted is simply an attempt to do by indirection what cannot be done directly."

In a Louisiana case, in 1916, State versus Milano. In [fol. 144] that case several persons had been indicted for the same offense, and the trial court had acquitted some of them. Apparently fearful that the Judge would acquit the remainder if given an opportunity, the prosecution secured second indictments against such persons in another court, and dismissed the first indictments. In holding that the dismissals were void, the Court cited the Coleman case, which is the Mississippi case I just referred to, and said:

"The abandonment of the prosecution in a court having jurisdiction and the institution of the prosecution for the same offense in another court of concurrent jurisdiction, under the circumstances and for the apparent purpose for which it was done in this case is not calculated to increase the respect that is due our courts; and we would not be inclined to encourage the practice, even if we had no precedent for our present ruling."

Does the United States Attorney say, and I ask again,—that he would have moved to dismiss this indictment in this district if the case had been—if the motion for change of venue had been overruled?

Now, let's come to the Bryson cases, and briefly discuss those cases that he cites as support for his position here. [fol. 145] He cites the Bryson cases. Your Honor, there are three Bryson cases, and you can't understand one, I

can't understand it, he can't understand the one he cites, unless you read the two that precede it. They were all in California, in the San Francisco Division.

The Court: Federal court?

Mr. Looney: The federal court, yes, sir, and that was in 1953, Your Honor, after Rule 21-A.

The Court: Those are the cases he cites?

Mr. Looney: Yes, sir. Now, I can tell you about those cases. It was one of those false affidavits, Communist affidavits, in connection with labor unions. He was indicted in California, the San Francisco division, Bryson was, and through his counsel he moved to dismiss the indictment there pending because it did not state an action against him in San Francisco. Venue. The court first hearing it—and there were three different judges that ruled on it, three different times—he overruled that motion and said it did state venue properly in San Francisco. Subsequently a corrective indictment was returned, as frequently happens—not frequently, but it happens at times, and they added—the Government became scared, notwithstanding the Court had sustained them—of their venue allegation, and they [fol. 146] added a little venue allegation in the corrective indictment and said this false affidavit was mailed, deposited in the mail at the San Francisco post office for transmittal to Washington.

The defendant came in with that corrective indictment, and says that the statute which he was charged with having violated, that the mailing was not a part of the offense, and moved to dismiss again, and with another judge in that district writing this time, Judge Oliver J. Carter, and this is not all of the opinion, but he says:

"However, since this is a problem of pleading, and since the conclusion reached is not free from question as a matter of pleading without consideration of the problem of proof,' - and this is what the Court said then—"the Court should point out that the problem would not be present if the indictment was returned in the district in which the alleged false affidavit was filed."

The Court suggested there that this problem, which is a serious problem, would not be presented if he were indicted in the District of Columbia, where the alleged false affidavit was filed. That happened. The indictment was returned,

subsequent to this decision, in the District of Columbia, and [fol. 147] the case which counsel cites in his reasons for dismissal, the last case which was decided on November 27th, 1953, the Court, after pointing out that the indictment charging the same offense against the defendant is now pending in the United States District Court for the District of Columbia, speaking through Judge Goodman, said:

"It has become the duty of the Attorney General to determine in which jurisdiction the offense charged 'was most probably committed, and bring the offender to trial there.' He has made such determination by requesting leave of the Court to dismiss the indictments in this district. His decision in that regard appears to be based on good reason,"—because of the doubt as to whether or not venue was out there in California. That is that the offense was most probably, or was probably committed, in the District of Columbia.

Now, counsel in this case doesn't come up and say to Your Honor, "Now, Your Honor, I have grave fears that this offense was not committed in the Southern District. I have just learned it. I have grave fears," and the Court has not in this case expressed any doubt whatever as to venue being brought in the Southern District of Texas, but [fol. 148] in the Bryson case it was before the Court on two different times before this opinion he cites came up, and it is pointed out that there were grave doubts as to whether the Courts in California could try the case, whether the mailing of the alleged perjured statement in connection with Communist activities, whether that be an offense, whether or not it could only occur where it was filed, in Washington, before the NLRB, and at the Court's suggestion it was that the indictment was brought in the District of Columbia, and the District Attorney sought to dismiss the case in California, and that is what the Court said. There was a good reason for the removal of it because of those grave doubts.

Now, Your Honor, then he cites Judge Atwell's opinion in the Great Atlantic and Pacific Tea Company case. That was decided on March 7th, 1944, two years before the new rules of federal procedure. Now, there were two motions before the Court at the time Judge Atwell wrote that opinion.

The Government moved to dismiss without prejudice its indictment, and the defendant had a counter motion to dismiss with prejudice. Both of them were moving to dismiss the indictment, and it is true, as Mr. Wilkey said, the defendant in saying that the Government should not [fol. 149] be permitted to dismiss with prejudice, they cited the fact they had done a lot of work, and so forth and so on, and if they dismissed it without prejudice it would undo all of their work, but what Judge Atwell said in deciding this case was simply this, that under the law as it then existed the District Attorney had the right to dismiss a case if he saw fit to dismiss it by merely filing a dismissal, and unlike the Judge in the Krakowitz case, Judge Atwell did not feel that there was anything that had happened there that would shock his conscience the least bit, or that would entertain any doubts about the procedure that the United States Attorney was following in that case, and he permitted, or granted the motion to dismiss without prejudice to the federal government, and overruled the motion of the defendants to dismiss with prejudice. Now, that is that case, if Your Honor please.

Now, we get down to the Krakowitz case. That was before the new rules too, before 1946, but Judge Krakowitz took this position, and I think, as far as I personally am concerned, I think rightly so. He points out in that decision that the United States Attorney at that time could have just come in and filed a dismissal without asking for the [fol. 150] Court's sanction or approval. He points out in his opinion, and he even has a report of the colloquy between the Court and counsel, in which he specifically invites the Special Assistant Attorney General, "Well, if you want to dismiss the case, just file it. I don't want to lend my sanction to it," and the Special Assistant Attorney General of the United States declined, expressly declined in open court, and said, "No, I don't want to dismiss it, or to exercise that power. I want the Court's sanction of my action in dismissing it," and Judge Krakowitz withheld his sanction and would not sign the order approving the dismissal, and in so doing that withheld his sanction, and wouldn't sign the order, and Judge Underwood said:

"Mr. Wallace, Special Assistant to the Attorney General, has argued to the Court, however, that upon the presenta-

tion of such a motion, the Court is powerless to deny it, no matter what the factual showing may be, and no matter how repugnant the proposed motion may be to the conscience of the Court."

And he said, "I am not going to lend my sanction to it. If you want to dismiss it, you just go and dismiss it. Don't ask me to put my signature on it. Don't ask me to endorse [fol. 151] that." That is the effect of what he did there.

Now, here is a significant thing. That is a very interesting opinion, it was to me, and certainly Judge Krakowitz went into it very carefully,—I mean Judge Underwood went into it very carefully, because in the course of his opinion he cited from an opinion by Chief Justice Taney, while Chief Justice Taney was Attorney General of the United States, way back before the new rules came in, and here is what he quoted Chief Justice Taney as saying:

"For if any doubts rested in the mind of the Court of the fairness and propriety of the measure, they would not suffer the entry to be made."

That is the entry of sanction by the Court.

Now, the Doe case that he cites, and it was, Your Honor, it was truly a John Doe case, old John Doe versus Richard Roe. For some reason Chief Judge Hincks overruled a motion to dismiss on December 3rd, 1951, and then on December 14th he decided he would set out his reasons for his action, and so instead of using the defendant's name, he said he was going to use John Doe, and did.

Now, it was under Rule 48-A, where the United States Attorney had moved the Court for leave of the Court to dismiss, and I have only a few short quotes from it. Here [fol. 152] is one from Judge Hincks:

"The rule contemplates that the Court shall exercise a sound discretion in the premises."

After saying that, he then pointed out that the Assistant Attorney General had by telegram, as in this case—I don't know whether that telegram has been presented or not, but the Assistant Attorney General by telegram sent from Washington at about 8:30 a.m., yes, he attaches it to his motion. May 3rd, 1955, 9:17 a.m., Eastern Standard Time.

"Malcolm R. Wilkey, care of United States Attorney, San Antonio, Texas.

"You are authorized to dismiss indictment pending Southern District of Texas against George B. Parr for violation of Section 145-B Internal Revenue Code of 1939, if and when indictment returned in Western District. H Brian Holland, Assistant Attorney General."

He states no reasons, just as in this case the Assistant Attorney General states no reasons, and here is what Chief Judge Hincks says. He just got through saying it is a matter of sound discretion for the Court, and he continues:

"Surely if the Court had discretion in the premises, it is entitled to the factual information upon which the final [fol. 153] departmental recommendation is based."

I sought to elicit that information, Your Honor, I think properly, and when they didn't want to voluntarily give it, Your Honor sustained their objection to it, or letting me interrogate them about those matters, but if they do not want to tell the Court, I suppose it is proper for the Court to not make them tell the Court.

Then the Chief Judge says, made this positive, unequivocal statement, for whatever it may be worth Your Honor:

"The dismissal can be approved only on a showing that the Government lacks evidence to warrant a prosecution."

That is what Chief Hincks said.

Have they presented any sort of evidence here? Have they made any sort of statement to Your Honor that they lack evidence to warrant a prosecution in the Southern District?

The Court: Who says that?

Mr. Looney: Chief Judge Hincks, in the John Doe case, Your Honor.

The Court: I doubt if that is correct.

Mr. Looney: Sir?

The Court: I doubt whether that is correct.

[fol. 154] Mr. Looney: I would say this, Your Honor, it was correct—in other words, what he said, he was not going to exercise his discretion to a dismissal of the case unless—and he thought the rule was unless they could show there was no evidence sufficient to support a prosecution. It is true the facts were not as the facts are in this case, Your Honor. He was outraged because the Attorney General was trying to dismiss a case that he thought no

indictment should have been brought on. It shocked his conscience. They ought not to be bringing indictments, and then trading off pleas of guilty for non-suits, but it shocked his conscience apparently, reading the opinion, and of course I say, if Your Honor please, that what he was saying here was that in his opinion, in his conscience, that matter, in his sound discretion, that the case ought not to be dismissed unless they could show that there was no—the Government could show that it lacked evidence to warrant a prosecution. That was in that particular case.

Now, here is one other thing, Your Honor. The Advisory Committee that was set up by the Supreme Court to make recommendations for these Federal Rules of Criminal Procedure did not recommend that the Attorney General [fol. 155] be stripped of his unbridled power to dismiss. It did recommend that a provision be put into the rule requiring him to state in writing his reasons therefore, so as to make it a matter of public record, where he could be called to account, I suppose, by any body at any time thereafter. That is what the advisory committee recommended on Rule 48-A. A statement for his reasons for dismissal.

But, Your Honor, the Supreme Court of the United States itself, notwithstanding the fact that the Advisory Committee did not recommend, it disregarded the recommendation of the Advisory Committee and placed the responsibility on the Court to grant or deny leave to the Attorney General when he sought to dismiss a case, and with no language to indicate, Your Honor, that the denial should only be refused in those instances where the Court might think the Government was getting too lenient with some defendants, there is nothing in the whole thing, with all of the reading I have done, in the Advisory Committee reports, the Law Review articles, or any of that, except that a dismissal of an indictment is or should be within the sound discretion of the Judge where the case is pending, and as I have heretofore pointed out what was meant by Judge Yankwich, when he [fol. 156] said that at any rate a decision of what is just and proper in the circumstances.

Now, Your Honor, Mr. Wilkey says—and I address a few remarks only to him because of the fact that he made the statements, and not because I think it is entirely due any

consideration, but he says, "Oh, we are going to generously come up to you, Mr. Defendant, and say to you that if this case in the Southern District of Texas is dismissed, and you go over to San Antonio or Austin, that we will agree that subject to the approval," and assuming they could get Judge Rice's approval to adopt somebody else's order,—I don't know whether they will or not—"We will agree with you, if Judge Rice is sitting in Austin and he is the Judge who regularly sits there, that he may enter the orders Judge Kennerly entered on the bill of particulars, on the subpoena, on the motion to inspect and photograph and copy," but they stop there. They don't say anything about we will agree that he may enter the same order that Judge Kennerly entered on the change of venue." No, "We won't join you in that." Yet they know; yet they know that it could be transferred from San Antonio on a motion of that kind. They say, "We will thereby save you any time, we will save the time of the Court and counsel by doing that."

[fol. 157] Your Honor knows the record made in this case on the venue question that it was the most time-consuming of all, so far as the attorneys are concerned, in getting the evidence for the Court's consideration. Mr. Wilkey blithely says it wouldn't cause any delay in prosecuting Mr. Parr if this case is dismissed and the prosecution goes to the Western District, but how is he, how can he be so all-knowing, if Your Honor please? Why wouldn't the defendant's counsel, in duty bound to the defendant, be obligated to go through the Austin Division and see whether or not, or ascertain whether or not he believes that there is any prejudice there so as to prevent him from getting a fair trial in Austin? I don't say there is, but I don't believe, if Your Honor please, that a case that has been so publicized as this case has been, a case where according to the press the prosecution was ordered—an unprecedented thing—by the Attorney General from Washington. I don't believe that we could discharge the duty that we owe a client in representing him unless we found out what the sentiment is there, and if we found out that it appeared there was prejudice against George Parr in Austin, the seat of the state government, that is where all of these investigations have been going on, that is where the papers are full of it, nearly so much so as

[fol. 158] Corpus Christi, and they have been for several years—if we go down there, and we want to file a motion, we go out and take our time, and get affidavits, and the Government replies and gets affidavits and submits them all, and we all start over again, and Judge Rice, or whoever is sitting in the Austin Division when the matter comes up, all of that is going to take time.

And so I say to you, if Your Honor please, that this generous offer he makes is not something that will appeal very much to the attorneys representing the defendant, and I doubt if it will appeal very much to the Court, unless he goes all the way.

Now, let us sum up this way, and I want to ask the Court's pardon for having trespassed on your time so much.

We do not say that the United States Attorney is acting beyond his authority in seeking leave to dismiss, nor do we say the Attorney General is acting beyond his authority in authorizing the U.S. Attorney to seek leave to dismiss. We could say it, if it was material but maybe it is not, and we ourselves doubt very much the propriety of it under the facts and circumstances in this case, but we do say this, Your Honor, and emphasize it with all of the vigor we can [fol. 159] summons to our command, the intellectual vigor, if any, we have, that this Court is not required to sanction, and should not sanction, the effort here made by counsel for the Government to thus set itself up as an appellate tribunal to review and nullify the previous order of this Court, and that is simply what they are doing.

Such action will create no more respect for a court, for the courts, and as the Alabama Supreme Court said, such action might create less. And the respect for the courts, which is a basis of this country without which it could not go forward, is more important, if Your Honor please, far more important than either the acquittal or the conviction of the defendant who stands at the Bar in this case.

Therefore, we, if Your Honor please, respectfully pray that the Government's motion be denied, and if it is we can apply to the Western District under rules of comity to stay the case over there pending the outcome of this one, and we are confident such motion would be granted if filed.

Thank you very much.

The Court: I think I can dispose of the matter without hearing further from the Government.

[fol. 160] As a retired Judge, I receive my work in this district from my brethren, the other Judges, and I received a request from Judge Alred to hear these four motions that are disposed of by the opinion filed.

In the motion for change of venue, I found an enormous record. I think there were more than one hundred affidavits, and certainly more than a hundred finally, because there were some filed after the record came to me. There were very satisfactory briefs, and there were several hundred—I didn't count them, and there may have been five or six hundred—clippings from two daily papers in Corpus Christi.

All of these I considered as carefully as I knew how to consider them, and I found myself settled on one opinion about whether the case should be tried in the Corpus Christi Division. I am doubtful that any Judge in this district, or any other district, reviewing the record as I did, would have reached any other conclusion, and that is that I reached the conclusion that the case should not be tried in Corpus Christi, and that defendant's motion for change of venue should be granted.

In reaching that conclusion, or rather in examining the [fol. 161] record, I reached this further conclusion, that I gravely doubted whether in the administration of justice generally, the case should be tried in this district at all. I reached that conclusion, not as favoring either the Government or the defendant, but more from the standpoint of a judge who is charged with the administration of justice in the district.

But when I came to examine the law, I found that I was without power to transfer the case outside of the Southern District of Texas. As you all know, we have in the state courts of Texas a practice by which the judge sometimes of his own motion sends a case here, there and elsewhere. There is no such provision in the federal statutes, and I found, as I understand the law, that I had no authority to transfer the case out of the Southern District of Texas. If I had had that authority I would have sent it to Amarillo,

or Sherman, or Texarkana, or some of those places as far removed from the scene of the troubles as I could, or as I could find. I would have done that not, as I say, to favor either the defendant or the Government, because I feel that justice in the case would be best administered by transferring the case to one of those places.

But as stated, I could not do that as I understand the law, [fol. 162] I then discovered that I could not transfer the case to any other division of the district except Laredo. You gentlemen who were in the case will understand or are familiar with the reasons that I gave in the opinion, which is concurred in by Judge Allred, and I think we are correct in that, that is on the law, that it was not legal, not within the power of the Court, to transfer the case to any place except to Laredo, so the case was transferred there.

Now we come to this motion by the Government to dismiss the case because of the fact that a new indictment covering the same matter has been presented in the Western District, and the Austin Division of the Western District, and I am asked by the Government to dismiss this case in this district. Under the rule—what is it, 46?

Mr. Looney: 48-A, Your Honor.

The Court: —48-A, evidently there is some discretion in the Court as to the matter of whether the case should or should not be dismissed.

In twenty-four years on the bench in this district, I do not recall ever having at any time hesitated to dismiss a case when requested by the Government. That was of course under the old law, and under the present rules. If [fol. 163] I have a discretion under the rules now as to whether this case should or should not be dismissed, I must exercise that discretion and allow it to be dismissed, because I do not think that the defendant, either in the hearing this morning or in this enormous record on the question of change of venue, has shown any reasons why the case should not be dismissed.

In doing that I am assuming as you want me to assume, that the Court in Austin has jurisdiction of the case. On that point, of course, I do not decide it does or does not, whether it has jurisdiction or does not have jurisdiction. I am going to dismiss this case as requested by the Government.

I will say I have enjoyed very much listening to you gentlemen, and hope you will be back in the Court again some time.

Mr. Looney: Your Honor, will you please note an exception to the Court's ruling?

The Court: Yes, all right. Will you prepare the usual order?

I think the case is now at Laredo, and this order should be entered, of course, in the Laredo Division. Prepare the order and submit it to counsel for defendant.

Mr. Wilkey: Yes, Your Honor, we will be glad to do that.

[fol. 164] The Court: Is there anything else this morning?

Mr. Wilkey: Not from us, Your Honor.

The Court: Court will recess under the rule.

[fol. 165] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS

ORDER OF DISMISSAL—Filed May 20th, 1955

A Motion in the form of a request for leave to file a Nolle Prosequi having been made on behalf of the Government, the Government having also filed therewith a Statement of Reasons for Dismissal and evidence of the authority of the United States Attorney for the Southern District of Texas to move to dismiss the indictment herein, and the Government showing an indictment against the same defendant for the same alleged offenses to have been returned in the Western District of Texas; and the defendant having filed an Opposition to Government's Application for Leave to Dismiss the Indictment; and said Motion having duly come on before me to be heard on the 16th day of May, 1955, after hearing Malcolm R. Wilkey, United States Attorney for the Southern District of Texas, and James T. Dowd, Assistant United States Attorney, for the Motion, and Everett L. Looney, attorney for the defendant, in opposition thereto, upon consideration of the papers filed, the facts adduced at the hearing (including all the papers and documents filed by the parties on the change of venue question, as well as

[fol. 166] this court's Memorandum dated April 27, 1955,

filed April 28, 1955, and the judgment of the court transferring this case from the Corpus Christi Division to the Laredo Division, of which judicial notice is taken), and the arguments of counsel thereon, it is

Ordered and adjudged that the said Motion in the form of a Nolle Prosequi to dismiss the indictment herein be, and the same is hereby granted, and this case is hereby dismissed; to which action the defendant excepts.

It is further ordered that the bond heretofore fixed in this cause is hereby cancelled.

(S.) T. M. Kennerly, United States District Judge.

Done at Houston, Texas, this 19 day of May, 1955.

Approved as to Form: (S.) Malcolm R. Wilkey, United States Attorney. (S.) Everett L. Looney, Attorney for Defendant.

[fol. 167] In United States District Court, Southern District of Texas

Notice of Appeal—Filed May 20, 1955

The name and address of the Appellant is George B. Parr, San Diego, Texas.

The name and address of Appellant's attorney is Everett L. Looney, 1920 Brown Building, Austin 1, Texas.

The offense is "Wilfully and knowingly attempt to evade and defeat income tax due to the United States of America in violation of Section 145 (b) Internal Revenue Code; 26 U. S. C. Section 145(b)."

A concise statement of the judgment or order dated May 19, 1955:

An order granting motion by the Government for leave of the Court to file a dismissal of the indictment against defendant and dismissing the case, terminating the prosecution.

The appellant, George B. Parr, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the above stated judgment.

Dated: May 19, 1955.

George B. Parr, Appellant, Everett L. Looney, 1020 [fols. 168-182] Brown Building, Austin 1, Texas, Attorney for Appellant.

[fol. 183] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 184-244] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GEORGE B. PARR VS. UNITED STATES OF AMERICA

MOTION TO DISMISS APPEAL—Filed June 16, 1955

Comes now the appellee, United States of America, by Malcolm R. Wilkey, United States Attorney for the Southern District of Texas, and moves to dismiss the appeal hitherto filed by appellant, George B. Parr, for the following reasons:

I. This appeal should be dismissed because the order of dismissal in the form of a nolle prosequi entered in the Southern District of Texas is *not* a "final decision" in a criminal case within the meaning of 28 U.S.C., Sec. 1291.

II. This appeal should be dismissed because to reinstate the prosecution in the Southern District of Texas would be a futile thing; as the Attorney General has the right and duty to elect which of two pending indictments to prosecute, the indictment in the Western District of Texas can be prosecuted to a final decision irrespective of any proceeding pending in the Southern District.

III. This appeal should be dismissed as frivolous because it is obviously without merit and taken for the purpose of delay.

Respectfully submitted, (S.) Malcolm R. Wilkey, United States Attorney, James T. Dowd, Assistant United States Attorney.

CERTIFICATE OF SERVICE (Omitted in printing).

[fol. 245] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GEORGE B. PARR, Petitioner,

vs.

HONORABLE BEN H. RICE, JR., UNITED STATES DISTRICT JUDGE for the Western District of Texas, Austin Division, et al., Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR WRITS OF MANDAMUS AND PROHIBITION—Filed July 1, 1955

George B. Parr, Appellant in Cause No. 15162 entitled George B. Parr vs. United States of America, pending in this court on appeal from a final decision of the United States District Court for the Southern District of Texas, Laredo Division, moves:

1. For leave to file the petition for a writ of mandamus and for writ of prohibition, hereto annexed; and

[fol. 246] 2. That a rule be entered and issued against the Honorable Ben H. Rice, Jr., United States District Judge for the Western District of Texas, Austin Division, and Malcolm R. Wilkey, Special Assistant Attorney General, James T. Dowd, Special Assistant Attorney General, and

Russell Wine, United States Attorney for the Western District of Texas, Austin Division, to show cause why a writ of mandamus and a writ of prohibition should not issue against them and each of them, in accordance with the prayer of the petition and why George B. Parr should not have such other and further relief therein as may be just.

Dated July 1, 1955.

Marvin K. Collie, Clyde L. Wilson, Jr., Esperson Building, Houston, Texas, Thomas E. James, Capital Natl. Bank Bldg., Austin, Texas, Everett L. Looney, Brown Building, Austin, Texas, Attorneys for the Petitioner.

[fol. 247] PETITION FOR WRITS OF MANDAMUS AND PROHIBITION

To the Honorable, the Chief Judge and the Judges of the Court of Appeals for the Fifth Circuit:

Comes now George B. Parr and by leave of the court first had and obtained, files this his petition for a writ of mandamus and for a writ of prohibition as hereinafter prayed for, against the Honorable Ben H. Rice, Jr., United States District Judge for the Western District of Texas, Austin Division; Malcolm R. Wilkey, Special Assistant Attorney General; James T. Dowd, Special Assistant Attorney General; and Russell Wine, United States Attorney for the Western District of Texas, Austin Division, and respectfully represents:

I

That he is the appellant in a case presently pending in this court on appeal, No. 15162 on the docket of said court.

The appeal so pending is from an order of the United States District Court for the Southern District of Texas, Laredo Division, dismissing a criminal case against him (R. 165).

The appeal is from a "final decision" within the meaning of 28 U.S.C., Section 1291, and this court has jurisdiction.

For authorities to support this latter statement see Point I, Brief of Appellant in George B. Parr vs. United States of America, No. 15162 pending in this court, page 5.

[fol. 248] The writ of mandamus and the writ of prohibition prayed for herein is in aid of and for the purpose of preserving the jurisdiction of this court to review the final decision of the district court, from which this appeal was taken.

In the appeal so pending, Parr is contending that (1) the dismissal was filed during the trial without his consent, contrary to the provisions of Rule 48(a) R.C.P., and (2) the order transferring the case from the Corpus Christi Division to the Laredo Division, Southern District of Texas, pursuant to Rule 21(a) R.C.P. is res judicata of venue and effectively lodged exclusive jurisdiction, of the offense charged by the indictment against him, in the Laredo Division, Southern District of Texas.

For these and other reasons stated in his Brief he urges that the judgment of dismissal filed May 20, 1955, from which the appeal to this court was prosecuted, is an erroneous final decision of the District Court of the United States for the Southern District of Texas, and that this court should reverse said order appealed from and remand the case to the Southern District of Texas, Laredo Division, with instructions that "the prosecution shall continue in" the Southern District, Laredo Division, and not elsewhere, as required by Rule 21 (c) R.C.P.

II

The record references herein will be to the record on file in this court in the case of George B. Parr vs. United States of America, No. 15162 on the docket of this court.

[fol. 249] The indictment in the case from the dismissal of which Parr has appealed in No. 15162, was returned and filed November 15, 1954, charging in three counts that the accused "did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America" for the calendar years 1949, 1950 and 1951, and the case was placed on the Trial Calendar immediately in accordance with Rule 21(a), Local Rules of the United States District Court for the

Southern District of Texas. The case was called for trial December 1, 1954, at which time the accused pled not guilty to the charges.

The court gave the defendant until January 3, 1955, within which to file motions and gave the Government until January 17 within which to reply (R. 13).

In a Memorandum Opinion dated April 27, 1955, filed with the clerk April 28, 1955 (R. 16), T. M. Kennerly, United States District Judge, to whom had been assigned four motions in the case (R. 17) directed that appropriate orders be drawn and presented (R. 35) disposing of defendant's motion for bill of particulars (R. 17), defendant's motion for discovery and inspection (R. 18), defendant's motion for subpoena duces tecum (R. 22) and defendant's motion to change the venue from the Corpus Christi Division to the Laredo Division (R. 25) in accordance with his Memorandum.

May 16, 1955, the court entered the orders directed in its April 27 Memorandum ordering particulars (R. 171), ordering production and inspection under Rule 16 (R. 175) and ordering the case transferred from the Corpus Christi [fol. 250] Division, Southern District of Texas, to the Laredo Division, Southern District of Texas (R. 53). The Government had opposed the motion for change of venue and had offered evidence in the form of affidavits in support of its opposition (R. 26).

Within six days of Judge Kennerly's action in transferring the case to Laredo, on May 4, 1955, the United States Attorney filed a motion for leave to dismiss the indictment (R. 36) accompanied by telegraphic authorization from the Attorney General dated May 3, 1955 (R. 37), a copy of an indictment returned against the accused in the Western District of Texas, Austin Division (R. 37), and his Statement of Reasons for Dismissal (R. 40), aliunde, "on May 3, 1955, an indictment against the defendant George B. Parr was returned by a federal grand jury at San Antonio, Texas, said indictment charging the defendant in three counts with the same identical offense as charged by the indictment in the instant cause." (R. 40).

May 3, 1955, your petitioner, by one of his counsel, requested leave to be heard in opposition to the motion to

dismiss before action was taken (R. 51). Submission of the motion was taken by Judge Kennerly pursuant to the direction of Judge James V. Allred who regularly sits in Corpus Christi Division (R. 53).

Petitioner not only did not consent to the dismissal of the case but filed his written opposition thereto and was heard orally against such dismissal (R. 165).

May 20, 1955, the order of dismissal (R. 165) was entered purportedly under the authority of Rule 48(a) R.C.P.

[fol. 251] The May 3, 1955, indictment against Parr returned by federal grand jury at San Antonio, Texas, charged him in three counts with the same identical offense as charged by the indictment in the case now pending in this court on appeal (R. 40).

On May 31, 1955, the United States District Court for the Western District of Texas, Austin Division, called the case brought against Parr in the Austin Division, being therein numbered Criminal 3866, for arraignment. Petitioner had previously filed a motion to stay the arraignment and all subsequent proceedings based on the pendency of this appeal; and, subject to the court's action thereon, he filed a motion to dismiss based in part on the proceedings had in the case now before this court. The court in the Austin Division was then engaged in a jury trial and could not hear the motion to stay and the motion to dismiss. On the statement of the court that the arraignment would be "without prejudice to any right" of Parr, he was thereupon arraigned and pled not guilty to the indictment and each count thereof.

Subsequently, on June 7, 1955, the United States Court for the Western District of Texas, Austin Division, heard and overruled the motion to stay all subsequent proceedings in cause No. 3866; and thereafter on June 13, 1955, heard and overruled the motion to dismiss the indictment. Both motions were predicated on the fact that the appeal was pending in this court from judgment of the United States District Court for the Southern District of Texas, Laredo Division, and that the Western District of Texas, Austin Division, had no jurisdiction of the defendant to try him under the indictment charging an offense identical with the [fol. 252] offense charged in the Southern District since ex-

clusive jurisdiction and venue of defendant for such offense was in the Southern District, Laredo Division.

And on June 10, 1955, Parr filed his motion under Rule 21(b) R.C.P. to transfer the case pending in the Western District, Austin Division, to the Southern District, Laredo Division; and, on June 21, 1955, amended said motion to request a transfer to the Laredo Division or, alternatively, to the Corpus Christi Division. On June 20, 1955, in aid of the motion to transfer Parr filed a motion for supplemental bill of particulars in preparation of his defense to show that the offense charged in the case pending in the Western District, Austin Division, was likewise cognizable in the Southern District, Corpus Christi Division. The court took submission of the motion for bill of particulars and of the motion to transfer under Rule 21(b) R.C.P. on June 24, 1955, and on June 29, 1955, entered an order, first overruling the motion for bill of particulars and, second, overruling the motion to transfer the case.

Proof of the proceedings in the Southern District of Texas, Corpus Christi Division and the Laredo Division, and of the pendency of this appeal was made to the United States Court for the Western District of Texas, Austin Division, at the hearing on the motion to stay, at the hearing on the motion to dismiss, and at the hearing on the motion to transfer.

On June 29, 1955, immediately after the court overruled the motion to transfer, and on the same day and at the same session, the defendant again advised the judge of that court of the pendency of this appeal and of the fact that the record had been filed therein and of the fact that the United States [fol. 253] Attorney had filed a motion to dismiss the appeal, and of the fact that he had completed his brief for filing and had filed twenty copies in this court on June 28, 1955; a copy of which was thereupon tendered to the court; and again urged the United States Court for the Western District of Texas, Austin Division, to stay the proceedings in that court until after the disposition of the appeal pending before this court. Said motion was overruled and the court set down for trial the case against Parr, Austin Criminal No. 3866, for the 18th day of July, 1955.

Unless prohibited by this court, the United States District

Court for the Western District of Texas, Austin Division, will proceed to try the case against Parr in that court; notwithstanding the pendency of this appeal and notwithstanding his action in so doing will constitute a usurpation of the jurisdiction of this court to hear and decide the issues presented on this appeal in this court in No. 15162 entitled George B. Parr vs. United States of America.

III

This court is authorized to issue its writ of mandamus and its writ of prohibition as prayed for herein in order to protect and preserve its jurisdiction over the person and subject matter of the case herein pending on appeal; and an alternative writ or rule nisi may be issued by a judge of this court, it having jurisdiction. 28 U.S.C., Section 1651.

Wherefore the petitioner Parr, the aid of this Honorable Court respectfully requesting, prays:

1. That a writ of mandamus be issued out of this Honorable Court directing and commanding the Honorable Ben [fol. 254] H. Rice, Jr., United States District Judge for the Western District of Texas, Austin Division, to vacate the order of said court entered on the 29th day of June, 1955, setting down for trial on July 18, 1955, the cause therein entitled United States of America vs. George B. Parr, and therein numbered Criminal 3866.

2. That a writ of prohibition be issued out of this Honorable Court prohibiting the Honorable Ben H. Rice, Jr., United States District Judge for the Western District of Texas, Austin Division, and the other judges and officers of the United States District Court for the Western District of Texas, and Malcolm R. Wilkey, Special Assistant Attorney General James T. Dowd, Special Assistant Attorney General, and Russell B. Wine, United States Attorney for the Western District of Texas, from exercising any jurisdiction over or proceeding any further in the case pending in the United States District Court for the Western District of Texas, Austin Division, entitled United States of America vs. George B. Parr, Criminal No. 3866, until the case pending on appeal in this court is finally determined in this court and in the Supreme Court of the United States

in the event a timely appeal should be taken by either party from this court to the United States Supreme Court.

3. That pending further order of the court herein, the Honorable Ben H. Rice, Jr., United States District Judge for the Western District of Texas, Austin Division, and the other judges and officers of said court, and Malcolm R. Wilkey, Special Assistant Attorney General, James T. [fol. 255] Dowd, Special Assistant Attorney General, and Russell B. Wine, United States Attorney for the Western District of Texas, be stayed or restrained from further proceeding in the United States District Court for the Western District of Texas, Austin Division, in the cause therein entitled United States of America vs. George B. Parr, Criminal No. 3866.

4. That the court grant to Parr such other and further relief as may be just in the premises.

Dated July 1, 1955.

Marvin K. Collie, Clyde L. Wilson, Jr., Esperson Building, Houston, Texas, Thomas E. James, Capital Natl. Bank Bldg., Austin, Texas, Everett L. Looney, Brown Building, Austin, Texas, Attorneys for the Petitioner.

[fol. 256] *Duly sworn to by Everett L. Looney. Jurat omitted in printing.*

ORDER GRANTING LEAVE TO FILE PETITION FOR WRITS OF MANDAMUS AND PROHIBITION

The foregoing motion for leave to file the petition is granted, and a rule is ordered to issue directed to the Honorable Ben H. Rice, Jr., United States District Judge for the Western District of Texas, Austin Division, and the other judges and officers of said court, and to Malcolm R. Wilkey, Special Assistant Attorney General, and James T. Dowd, Special Assistant Attorney General, and Russell B. Wine, United States Attorney for the Western District [fols. 257-270] of Texas, to show cause why the relief should not be granted as prayed.

The rule shall be returnable on the — day of ——, 1955, at — o'clock — m. when the parties will be heard upon

the question of the jurisdiction of the United States District Court for the Western District of Texas, Austin Division, to make the orders complained of and proceed further with the case of United States of America vs. George B. Parr, Criminal No. 3866, pending in the United States District Court for the Western District of Texas, Austin Division.

Dated July —, 1955.

——— ———, Judge.

[fol. 271] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15612

GEORGE B. PARR, Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the Southern District of Texas

ORDER DISMISSING APPEAL AND DENYING MOTION FOR LEAVE TO FILE PETITION FOR WRITS OF MANDAMUS AND PROHIBITION—July 13, 1955

Before HUTCHESON, Chief Judge, and CAMERON, Circuit Judge, and DAWKINS, District Judge.

By the Court:

This cause came on to be heard on the motion filed by appellee to dismiss the appeal in the above entitled cause, and on the reply of appellant thereto, and was taken under submission by the Court;

On consideration whereof, it is ordered that the motion to dismiss the appeal filed by the appellee in the above numbered and entitled cause be granted, and that said appeal be dismissed.

It is further ordered that the motion for leave to file petition for wits of mandamus and prohibition filed in this cause be, and the same is hereby, denied.

ORIGINAL FILED—July 13, 1955.

[fol. 272] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

JUDGMENT—July 13, 1955

This cause came on to be heard on the motion filed by appellee to dismiss the appeal in the above entitled cause, and on the reply of appellant thereto, and was taken under submission by the Court;

On consideration whereof, it is ordered that the motion to dismiss the appeal filed by the appellee in the above numbered and entitled cause be granted, and that said appeal be dismissed;

It is further ordered that the motion for leave to file petition for writs of mandamus and prohibition filed in this cause be, and the same is hereby, denied.

[fol. 273] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15612

GEORGE B. PARR, Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the Southern District of Texas.

OPINION ON MOTION OF APPELLEE TO DISMISS THE APPEAL AND ON MOTION FOR LEAVE TO FILE PETITON FOR WRITS OF MANDAMUS AND PROHIBITION—July 22, 1955.

Before HUTCHESON, Chief Judge, CAMERON, Circuit Judge, and DAWKINS, District Judge.

HUTCHESON, Chief Judge: This appeal is from an order dismissing, on motion of the United States, an indictment

in three counts returned against the defendant below, appellant here, in the Corpus Christi Division of the Southern District of Texas, and charging him within such division [fol. 274] and district with preparing and causing to be prepared false and fraudulent income tax returns for the years 1950, 1951, and 1952, and filing them with the Collector of Internal Revenue for the First Internal Revenue Collection District of Texas, by depositing and causing them to be deposited at the Corpus Christi Division Office. Giving notice of appeal from the order, defendant is here attacking it as erroneous and seeking its reversal.

The United States, proceeding under Rule 39(a), Federal Rules of Criminal Procedure, 18 U.S.C.A., "Supervision of Appeal in Appellate Court",[1] has filed a motion to dismiss the appeal on three grounds,[2] and the matter is before us on the motion to dismiss.

Supporting its motion by brief and argument and the citation of many authorities,[3] the United States urges upon us that the only kind of order having the requisite finality to support an appeal in a criminal case is one imposing a sentence and leaving nothing to be done but to enforce by execution what has been determined, and that the order in question determined nothing as to defendant's guilt or innocence. So urging, it insists: that whatever may be the merits of appellant's contentions as to the correctness or incorrectness

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[1] Cf. Semel v. United States, 158 F.(2) 229.

[2] These are: (1) that the order of dismissal is not appealable because not a final decision in a criminal case within the meaning of 28 U.S.C., Sec. 1291; (2) because, as the record shows, the defendant has been indicted in the Western District of Texas, and it is the intention of the government to prosecute that indictment to a final decision there; and (3) because the appeal is frivolous and obviously without merit, and is taken for the purpose of delay.

[3] Particularly Berman v. U.S., 302 U.S. 211; Cobbledick v. U.S., 309 U.S. 323; U.S. v. Swidler, 207 F(2) 47; Lewis v. U.S., 216 U.S. 611; Heike v. U.S., 217 U.S. 423; McLish v. Roff, 141 U.S. 661; Ex parte Altman, 34 Fed. Supp. 106; and U.S. v. John Doe, 101 Fed. Supp. 609.

of the judge's action in entering the order, those contentions are not, they cannot be, for decision here; and that, since the dismissal of the indictment determined nothing except that [fol. 275] it would be no longer prosecuted, the determination by us of defendant's contentions must await the entry of, and the appeal from, a final judgment.

On his part, the appellant, realizing that an ordinary dismissal on the motion of the United States of a pending indictment is not a final judgment from which an appeal will lie, is here insisting that the order appealed from is not such an order, and this appeal is not such an appeal. So insisting, he thus states his case:

> "It is the position of the accused that (1) the dismissal was filed during the trial without his consent, contrary to the provisions of Rule 48(a) Rules of Criminal Procedure, and (2) the order transferring the case from Corpus Christi Division to the Laredo Division, Southern District of Texas, pursuant to Rule 21(a) R.C.P., was res judicata of venue and effectively lodged exclusive jurisdiction of the offenses charged by the indictment against accused in the Laredo Division, Southern District of Texas. For these and other reasons stated below, the accused urges that the judgment of dismissal filed May 20, 1955, from which this appeal is prosecuted is an erroneous final decision of the District Court of the United States for the Southern District of Texas, Laredo Division, within the meaning of 28 U.S.C., Section 1291."

In support of his position, as thus stated, appellant cites no federal decision, there is none, holding that an order dismissing an indictment is appealable, none supporting his claim that under federal jurisprudence the order in [fol. 276] this case was a final and appealable order. Instead he cites cases dealing with non suits entered in civil cases such as *Cybur Lumber Co. v. Eckhart* (5 Cir.) 247 Fed. 284; *Mass. F. & M. Ins. Co. v. Schmick*, 58 Fed (2) 130; Cf. *Marks v. Feist, Inc.*, 8 Fed (2) 460; *Ruff v. Gay*, 67 F(2) 684; *Weeks v. F. & C. Co.*: 218 F(2) 503; and *Vaughan v. City Bank & Trust Co.*, 218 F(2) 802.

He further urges that the order, entered on defendant's

motion, transferring the case from the Corpus Christi to the Laredo Division for trial was res judicata as to the jurisdiction and venue of the prosecution of the defendant for the identical offense charged in the indictment in this case; that the court, therefore, was without authority to dismiss the case under Rule 48(a) Federal Rules of Criminal Procedure, 18 U.S.C.; that under the circumstances the only order of dismissal authorized is with prejudice forever terminating the prosecution of defendant for the offense charged; and that thus the order sought to be appealed from is invested with finality. He, however, cites no federal cases in support of this view. Instead he relies entirely upon decisions of state courts controlled by particular statutes or particular principle or theories of jurisprudence. Basic among them is the case of *Coleman v. State*, 37 So. 937, a Mississippi decision holding that *under a statute providing in effect that where an offense is committed in one or more counties that county where the offense was commenced, prosecuted or consummated, where prosecution shall be first begun*, shall have exclusive jurisdiction of the cause, the state could not, after having begun the prosecution in one county, dismiss the indictment and file it in another county. He also cites several civil cases from Texas, one of [fol. 277] them holding that under certain conditions interlocutory orders, though not appealable for want of finality, may be complained of on an appeal from a final judgment in the cause, *Coke v. Pottorff*, 140 SW(2) 586, and others that, under Texas Rules of Civil Procedure expressly so providing, appeals will lie from certain interlocutory orders.

As his final position, appellant, disputing appellee's claim that the appeal is frivolous, asserts that his claim of prejudice from the dismissal order is meritorious in that if the orders transferring the cause to the Laredo Division and then dismissing the indictment, did not constitute former jeopardy so as to prevent further prosecution, the order of transfer was a holding that he could be prosecuted only in that division and in legal effect prevents his being prosecuted in the Western District of Texas, or anywhere except in the Laredo Division of the Southern District.

Interpreting these contentions and arguments in terms of legal theory, they seem to be: that when, after lengthy hear-

ings, Judge Kennerly granted defendant's motion to transfer the case to Laredo, his ruling was a final and irrevocable adjudication that jurisdiction of the offense of defrauding the revenue was thereby exclusively vested in the Laredo Division of the Southern District of Texas; that it created in the defendant a vested right to be tried there, and there alone; and that, when the government presented the facts to a grand jury and obtained an indictment in the Western District of Texas, and then, as appellant claims, erroneously procured a dismissal of the indictment earlier obtained in [fol. 278] the Southern District, it in effect induced the court to enter an order depriving defendant of that right, and thus the order appealed from was invested with finality and was and became a final judgment. Thus, as it seems to us, presenting his position at once on the motion to dismiss and on the merits of the appeal and analogizing the dismissal of the indictment over his objection to a non suit in a civil case over the objection and to the prejudice of the defendant, the defendant argues quite contradictorily: (1) that this deprivation furnishes the element which at once invests the order with finality sufficient to make it appealable and requires its reversal; and (2) that if it stands unreversed, it has the effect of entitling him to an acquittal altogether.

We pass, without consideration or discussion of them, appellant's views on the merits, because, unless the order is final and we think it is not, the merits are not before us to take up and dispose of the only matter now before us, the finality *vel non* of the order here sought to appealed from.

We think it clear that none of defendant's claims that it is final are well taken, as bearing upon the finality of the order for the purpose of appeal. All that occurred in this case and the sole purport and effect of the order sought to be appealed from is simply that the United States has elected to discontinue, and has discontinued, the prosecution of the indictment returned in the Southern District of Texas, and that the order sought to be appealed from is therefore not final but discretionary and interlocutory and not appealable. *Semel v. United States*, 158 F(2) 233, and authorities cited [fol. 279] in note 3, *supra*. These, though not on all fours on their facts, do give insight into the problem of "finality"

presented here. They, together with Swift, 339 U.S. 684 and Cohen, 337 U.S. 541, indicate the general and consistent approach that an order is "final" only if it terminates the matter in controversy below. When a seemingly interlocutory order has been held appealable, it has been on the theory that irreparable injury will result from dismissal of the appeal or that the particular narrow issue with which the order was concerned is wholly separable from the remainder of the case and the order terminates the separable issue.

The matter put in controversy by the dismissed indictment was the defendant's guilt of the crime of tax evasion charged in it. That issue was never reached for determination, let alone determined, and under the controlling authorities cited, *supra*, the appeal must, therefore, be, and is hereby DISMISSED for want of finality in the order appealed from.

From these views that the order appealed from was not a final order and the court is without jurisdiction of this appeal to be followed by an order dismissing it, completely inconsistent as they are with the theory of protecting and preserving this court's jurisdiction, on which appellant's motion was filed in this cause, it follows that the motion for leave to file petition for writs of mandamus and prohibition must be, and it is, denied.

CAMERON, Circuit Judge: I dissent.

[fol. 280] CAMERON, Circuit Judge, dissenting:

I

In its opinion granting motion of appellant Parr to change the venue of the first indictment from the Corpus Christi Division, where it was brought, to the Laredo Division of the Southern District of Texas, the District Court said in part:

> "* * * substantially all of the persons who made such affidavits mention or refer to the publication of many articles about defendant in two newspapers published at Corpus Christi with large circulations in the Corpus Christi Division. Defendant has brought and offered in evidence clippings, etc. of a very large number of these articles or publications, extending over a period

of several years and on down, which I have studied. * * * [Later the Court estimated the number as between five and six hundred.] It is sufficient to say that the defendant has therein been given, during recent years, much publicity, unfavorable and sometimes most unfavorable. Such publications, generally with prominent headlines, are directly or indirectly with respect to defendant * * * and concern political matters, elections, law enforcement, taxation, etc., generally and in the town of San Diego and in Duval County, where defendant resides, and in some adjoining counties. They are also with respect to the killing at night of a young man at Alice, Texas, in connection with which defendant and persons associated * * * are mentioned. Also with respect to the stationing of Texas Rangers [fol. 281] in Duval County, the investigation by the Attorney General of Texas * * *. Also with respect to the impeachment of certain judicial and other officers thereof. Also with respect to many lawsuits filed on behalf of the State of Texas and the United States against defendant * * *.

"These publications whether standing alone or when considered in connection with such affidavits, support, strengthen and confirm my view that there is so great a prejudice against defendant in the Corpus Christi Division that he cannot obtain a fair and impartial trial there in this case."

It was in a jurisdiction pervaded by that atmosphere that the Government initiated this prosecution. In so doing, the Government's attorney asserted that a precedent, observed for twenty years, of bringing such prosecutions at Austin, was broken. Having the right to prosecute at several other points, it chose as the battleground upon which appellant's liberty would be decided a community in which the Government would have had all of the advantage and the appellant would have had a hard uphill fight.

[1] The matter is before us on appeal from order dismissing the first indictment and also on Petition for Mandamus and Prohibition and Motion to file same. Parr will be referred to in every instance only as appellant.

When the motion for change of venue was made the Government opposed the change and offered many affidavits in opposition to it. After an extended hearing in which the parties filed elaborate written briefs, the District Judge granted a change of venue based upon the conditions found by it to exist where the prosecution was brought.

[fol. 282] In commenting upon the transfer to the Laredo Division the District Court mentioned that the Government "did not, when the case was first submitted, claim that it could not obtain a fair and impartial trial at the Laredo Division, nor does it do so now. It says in its brief * * *, 'that the Government would be under a severe handicap in prosecuting this defendant in the Laredo Division'." The District Court then proceeded to describe certain political controversies as existing in the Laredo Division, appellant being in one political camp and some of the prosecuting witnesses being in the other. Having considered the showing fully, the District Court concluded, "I do not think that the evidence shows that the Government either will or might be under a severe handicap in the prosecution of this case as claimed. I find to the contrary". The carefully drawn opinion was written by retired District Judge Kennerly and concurred in by active Judge Allred.

That opinion was filed April 28, 1955 and five days later, May 3rd, the United States Attorney called the District Judge over long distance telephone advising that the Government desired to dismiss the first indictment because a new indictment had been returned in the Western District of Texas. He stated to the judge that he did not believe that the defendant could be heard on the matter under Rule 48. The regular District Judge ruled otherwise, however, and set the motion to dismiss for hearing before Judge Kennerly.

The motion to dismiss the first indictment was filed May 4, 1955 and with it was filed a copy of the new indictment returned in the Western District involving the same facts. [fol. 283] With it also was filed a written statement of reasons for the dismissal. The chief reason given was that the Government had chosen to present the new indictment in the Western District and that it had a right so to do, adding that new factors had been introduced in the situation:

"Among the recent factors weighing in the overall appraisal of where prosecution should be had should be mentioned the recent decision of the court to transfer venue from Corpus Christi to Laredo in the Southern District of Texas. This means that trial will be had in a division in which neither the taxpayer lives nor the Government chose originally to bring prosecution, and thus establishes a set of circumstances which was never in the contemplation of Government counsel at the time the original prosecution was brought in the Southern District of Texas."

The District Court for the Southern District conducted an extensive hearing on the Government's motion to dismiss the first indictment in which it heard an extended statement by the Government counsel and a like statement by one of appellant's counsel, and the Government counsel was subjected to a short examination by appellant's counsel.

From the statement of Government counsel and the testimony given by him, the chief articulated reason for the motion to dismiss the Corpus Christi indictment was that the Government did not feel that the witnesses for the Government would stand up as well in the Laredo Division as they would elsewhere. In his testimony, the attorney adverted to the fact that it was easier to make proof of venue [fol. 284] in the Austin Division (Western District), but his answers, on the whole, failed to sustain that contention. Here is an answer given by the attorney which may be taken as epitomizing the underlying reason for the Government's opposition to trying the case in the Laredo Division:

> "• • • the very fact that the case in the Southern District has now been transferred to Laredo, and the fact that testimony will have to be elicited from witnesses who are either reluctant or hostile makes—throws a different light on the Government's proof of venue, as it does on the Government's proof of other aspects of the case. I point out to you in that regard that Mr. Benson here, who was in the employ of Mr. Parr and signed the tax returns, was an employee of Mr. Parr and he has lived down in that area. Not going further into the case, but the change in the location affects the proof as to venue as it does the other facts of the Government's case. • • •

"As far as the basic facts are, we believe them to [be] the same; as far as the practical problem of proof in a lawsuit, the scene has been altered, the situation has been altered considerably by the shifting of the case from Corpus Christi to Laredo."

At another point in his testimony Government counsel thus summarized the attitude that the Government had the plain right to shift the scene of the trial and was merely exerting that right:

"I think it has been very clear from several documents that we have filed that we would have preferred [fol 285] the case to remain in Corpus Christi, and it is certainly clear from the action of the Attorney General and myself that the Attorney General prefers the case go to Austin, and believes, in the exercise of his office as the chief prosecutor, it ought to be prosecuted there in Austin."

The Judge for the Southern District made it clear in his brief opinion what influenced him to grant the motion to dismiss:

"Now we come to this motion by the Government to dismiss the case because of the fact that a new indictment covering the same matter has been presented in the Western District. * * * Evidently there is some discretion in the court as to the matter of whether the case should or should not be dismissed.

"In twenty-four years on the bench in this district, I do not recall ever having at any time hesitated to dismiss a case when requested by the Government. That was, of course, under the old law, and[2] under the present rules. If I have a discretion under the rules now as to whether this case should or should not be dismissed, I must exercise that discretion and allow it to be dismissed, because I do not think that the defendant, either in the hearing this morning or in this enormous record on the question of change of venue, has shown

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[2] It is evident that the transcript omits the word not at this point.

any reason why the case should not be dismissed . . . I am going to dismiss this case as requested by the Government."

[fol. 286] Appellant prosecuted an appeal from the judgment entered dismissing the former indictment, and briefs have been filed and that case stands on our docket for decision in due course.

Thereafter on May 31, 1955 the Government called up criminal case 3866 in the Austin Division of the Western District of Texas, the new indictment, and appellant filed a motion to stay proceedings therein until the appeal could be disposed of. That motion was overruled and appellant filed a motion to transfer the second indictment to the Laredo Division of the Southern District for trial, which was likewise overruled. The District Court for the Western District of Texas thereupon set the new indictment for trial July 18, 1955. Immediately thereafter appellant filed in this court a Petition for Mandamus and Prohibition together with motion for leave to file the same, and the Government has filed its opposition thereto along with a motion to dismiss the appeal.

II

I think leave should be granted that the Petition for Mandamus and Prohibition be filed and that an order should be entered at least holding these complex proceedings in *status quo* until the appeal may be heard in due course, and the proceedings can be carried on in an orderly fashion preserving the rights of the appellant and the Government alike. The majority holds that the appellant is entitled to no relief at all, based chiefly upon the ground that it is conceived that appeal does not lie from the order dismissing the first indictment. I think that the appealability of that order presents a serious question. Under the recent de-[fol. 287] cisions of the Supreme Court in *Swift, etc. Co. v. Compania, etc.*, 339 U.S. 684, and *Cohen v. Beneficial etc. Co.*, 337 U.S. 541, and our decision in *Tomlinson v. Poller*, 220 F.2d 308, there is a probability that appeal does lie from this order. But I see no reason to decide this question now. The Government has offered no explanation at all for its great haste in bringing its indictment returned in May to

trial at once. The events forming the basis of the prosecution occurred between four and six years ago. There is no reason why the appeal should not be heard in due course by this court, having the benefit of oral argument of counsel and leisurely study of the briefs.

III

But we have ample power to deal fully with this situation even if that order is not appealable and there is precise precedent for such a course. In *Atlantic Coast Line R.R. Co. v. Davis*[3], we sustained Mandamus and Prohibition as proper means for arresting proceedings in order that justice might be done with respect to a non-appealable order. We gave as a reason (185 F.2d 768) for allowing the extraordinary writ that the situation was of such a nature as "renders the likelihood of any fair and effective correction of the action of the Court by subsequent appeal * * * highly improbable, if not impossible". [Citing cases.] The same is true here as regards the probability of correcting, after possible conviction on the second indictment, any error which may have been made in permitting dismissal of the first [fol. 288] indictment. And we noted further that the allowance of the writ was in "aid and maintenance and protection of this Court's appellate jurisdiction." A District Court in Florida had entered an order under 28 U.S.C.A. 1404(a) transferring a civil action to another district for trial. Appeal did not lie from that order.[4] Nevertheless we allowed Petition for Mandamus and Prohibition to be filed and ordered the District Court to vacate the transfer order and to proceed with the trial of the case. If the facts justify it, we can grant full and appropriate relief here.

I think the facts do justify it. I would not state my reasons for dissent if I did not feel that this record presents an important question of procedure whose protection appellant is entitled to invoke and whose definition the bench and bar

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[3] 5 Cir. 1950, 185 F.2d 766, Petition for leave to file mandamus, etc. denied by Sup. Ct. 340 U.S. 941, and the cases cited and see 28 U.S.C.A. 1651(a) and the additional cases collected in the article cited in Note 6 *infra*.

[4] Crummer et al v. duPont, et al, 5 Cir. 1952, 196 F2d 468.

are entitled to have. It is the duty of the courts to hold the scales of justice in equal balance between the Government and a citizen charged with crime in exactly the same manner as those scales are held in litigation between two private individuals.

An instinctive feeling of doubt arises whether these proceedings would be attended with the same results if they were between two private litigants. Suppose private litigant A had sued private litigant B in a civil action and had chosen to lay the venue in the Corpus Christi Division. B came along and filed a motion to transfer to the Laredo Division under 28 U.S.C.A. 1404(a). After an extended hearing and over the opposition of A, an order was entered transferring the case to the Laredo Division.[5] Without [fol. 289] waiting for a week to pass, litigant A sought out another forum and there served the same complaint on litigant B proceeding back to the original jurisdiction with the request that the original civil action be dismissed solely on the ground that A did not feel that his witnesses would stand up as well in the jurisdiction to which the transfer had been made. It is not hard to visualize the effectiveness with which counsel could declaim that the processes of the courts were being trifled with to harass litigant B.

With respect to civil litigation, it has been said that, prior to the passage of 28 U.S.C.A. 1404(a), venue was the "prime prerogative of plaintiffs".[6] It was pointed out that this Act of Congress had transferred some of that prerogative to the defendant and a large portion of that prerogative to the court, to be used by the court in deciding questions of venue on the basis of fairness to both parties. It was further pointed out that the courts have almost universally exercised that prerogative to see to it that the rights of both the parties are protected without advantage to either.

Does not Rule 48(a) have a similar effect with respect to

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[5] Of course, the case here is stronger for appellant. The transfer here was from a point where prejudice palpably existed in favor of one litigant to a point where prejudice did not exist for or against either litigant.

[6] "*Forum Non Conveniens* and 28 U.S.C.A. 1404(a)": 23 Miss. Law Journal p. 1 (December, 1951).

criminal prosecutions? Are we to assume, as the court below manifestly assumed, that venue is still the prime prerogative of prosecutors to be used in a situation like this one to gain an advantage for the Government or to escape from a position of less advantage in which the Government found itself as the result of its own election?

[fol. 290] I do not think so. Prior to the adoption of the new rule, the Government had a free hand and had used it freely. The court below stated in its opinion that in more than twenty years it had never refused the Government in its request for dismissal and it is reasonably clear that this unbroken practice was decisive in its mind.[7] If that is still the law, the innovation in the Rules of Criminal Procedure requiring an order of court before an indictment could be dismissed would be meaningless and without purpose.[8] The

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[7] Besides indicating its feeling that the Government still had, under Rule 48, practically an absolute right to dismiss the Court indicated further that, in the hearing of such a motion the defendant had the burden of proving that the indictment should not be dismissed. Both assumptions represent misconceptions of the law. The Government, seeking affirmative action by the Court, carried the burden of showing that there was some valid legal reason for the dismissal.

[8] The Notes of the Advisory Committee, 18 U.S.C.A. pp. 537-8, contain this comment:

"The first sentence of this rule will change existing law. The common law rule that the public prosecutor may enter a nolle prosequi in his discretion, without any action by the court, prevails in the Federal Courts. * * * This provision will permit the filing of a nolle prosequi only by leave of court. This is similar to the rule now prevailing in many states. * * *"

The Advisory Committee had recommended that the right to dismiss be left with Government attorneys with the requirement that written reasons be given. But the Supreme Court rejected that recommendation and inserted the requirement for court approval.

Even before the passage of this rule, one District Court had held that the Court had the power, in the exercise of a judicial discretion, to refuse a requested dismissal, U.S. v. Krakowitz, D.C. Ohio, 1943, 52 F. Supp. 774.

manifest basis for the change in procedure was that the Supreme Court, with Congressional approval, was doing with respect to criminal prosecutions, what Congress had done with respect to civil actions: it was taking the choice of venue out of the unfettered hands of the litigants and giving it to the courts to be exercised in a way which would insure justice and equal treatment to all parties.[9]

[fols. 291-292] If that was the purpose and if that is the meaning of the rule, then there is grave doubt whether that purpose and that meaning have been vindicated here. There is no way the Government can escape the conclusion that its actions here were taken in an effort to select a forum in a locale where the atmosphere would be favorable to the Government and not to the defendant.[10] No criticism is

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[9] Few cases are cited by counsel and they are not of much help. Two federal cases are brought to our attention, United States v. Haupt, C.A. D.C., 152 F.2d 771, and United States v. Jones, 7 Alaska 378, and both speak in condemnatory terms of the practice of multiple indictments. The practice of dismissing an indictment in order to proceed under a new one in a more favorable climate is condemned in several state court cases, notably Ex Parte, Lancaster, Ala. 1921, 89 So. 2d 721, State v. Milano, La. 1916, 71 So. 131, and Coleman v. State, Miss. 1904, 35 So. 937.

[10] The Government's attorney had said this, in stating to the District Court the reasons the Government desired the order of dismissal: "These witnesses, in most instances, are reluctant, and in some instances are hostile. We feel that the trial of the case in Laredo, close to the defendant's seat of political power and his associations there, would have an adverse effect on eliciting the truth from the witnesses the Government will be forced to bring in order to establish this case. * * *"

The Atlas shows that Laredo is in Webb County and San Diego is in the adjoining County of Duval, and that the two Cities are rather close together. It further shows that Austin is more than one hundred miles away from San Diego. Students of the problem of law enforcement largely agree that government functions at its best at the local level, and that prosecutions are likely to bring more just results

directed to such a course. Litigants from time immemorial have jockeyed for positions of advantage and have shopped about in an effort to light upon the most favorable venue situation for their own success. But courts have to be blind to such machinations. They must weigh the facts of the [fol. 293] case before them and give judgment based upon the rights of the parties contending as equals and upon a battleground which favors neither.

The Government made its selection of the battleground in the first instance as it had a right to do. The court found that battleground to be too favorable to the Government and unfair to the defendant. The court changed the battleground to one it adjudicated to be favorable to neither side.[11] To permit the Government, under those circumstances, to repudiate the whole proceeding it had initiated and to move the scene of the fight to another place of its own selection is to open the door to the possibility of grave abuses. Further, such a course would deny appellant rights which he is entitled to have the courts protect.

If it be thought that the views here expressed give hospitality to the concept that the Government does not belong

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when they are conducted where the defendant and the witnesses are known and where the difficult question of law enforcement has its most direct impact. The vast majority of criminal prosecutions are conducted in such an atmosphere. Jurors who have no acquaintance with the defendant or the witnesses and who do not have a knowledge of all of the facts and circumstances surrounding the problem of the enforcement of the law—such as would inevitably be the case in a district so far removed from the site of the happenings forming the basis of the prosecution—are at a great disadvantage.

In passing on the Government's contentions that it would be under a disadvantage in a trial at Laredo, which it had presented fully on the motion for change of venue, the District Court had ruled directly that the Government would not be under a disadvantage there.

[11] It is true that the battleground was the choice of the defendant, but the Court found that the rights of the Government would not be prejudiced in the Laredo Division.

in a favored-litigant class, they are so intended. The mass of litigation, both civil and criminal, to which the Government is party is sufficient to cause the courts increasingly to give most careful scrutiny to the status of the Government as a litigant. In the very nature of things, the Government enters every contest with a citizen with a distinct [fol. 294] advantage.[12] Moreover, all who have not been blind must know that it has frequently been treated as a favored litigant. That is not as it should be. When the Government enters litigation with its citizens, it must stand as as equal and, must toe the same mark private litigants

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[12] This thesis was well developed by a paper entitled "The United States as a Litigant," read May 30, 1952 to the Judicial Conference for the Fifth Circuit, and a part of the records of that Conference, by Hon. Robert B. Troutman of Atlanta, Georgia. Here is an excerpt from that paper:

"With this vast power, and these tremendous resources, the United States is, indeed a formidable adversary * * * The ordinary citizen stands in awe when confronted with such litigation. * * * It is a Goliath, a giant in power, whose challenge a modern Saul and all his Captains might with good reason hesitate to accept. More often than not, however, the citizen has no choice. The initiative is on the side of the Government.

"The odds apparently are uneven. * * * He is assured, however, that the end and aim of his Government is the protection of his freedom and his 'rights'. In an even broader sense, justice to the individual is its aim. History tells him that those 'rights' were established by litigants with the courage to combat tyrants who sought to deny them, before judges who had the courage to uphold them. In such contests our profession has supplied both the adversary advocates and the judges. The latter have been set apart and charged with responsibility of seeing that justice be done to the individual and to the Government. * * * The seal of the Department of Justice to which they belong contains a motto, '*Qui pro Domina Justitia Sequitur*'. It appears on the flag which flies over the Department's office. Liberally translated, 'The Department of Justice Prosecutes In Behalf Of Our Lady Justice'."

must come to. It is hard to conceive that a private litigant could make a test run in one jurisdiction and fail, and then start a proceeding in another jurisdiction and get his action to trial on the merits with such speed while, at the same time, the former action was pending and undisposed of, or was improperly dismissed.

IV

The Government takes the position that appellant has no stake in the continued pendency of the prosecution first brought. That position is untenable. If it should be held that the motion to dismiss that indictment should have been overruled, the parties litigant will have two cases pending in separate jurisdictions and involving the same subject matter. The respective courts called upon to deal justly as between the parties will exercise their respective discretions, having due regard for the dictates of justice as well as for the comity usually observed in such matters.[13] We [fol. 295] so held in *Illinois Central v. Bullock*, 5 Cir. 1950, 181 F. 2d 851. The Government argues that, under *Carpenter v. Edmonson*, 5 Cir. 1937, 92 F. 2d 895, the District Court for the Western District of Texas would have no discretion but to proceed to hear the case it elected to press. That argument too is unsound. The *Carpenter* doctrine was considerably weakened by *McLain v. Lance*, 5 Cir. 1944, 146 F. 2d 341, and was repudiated in the *Bullock* case, *supra*. The law now is that each judge called upon to try a case pending also in another jurisdiction has the right and duty to exercise a judicial discretion as to whether the case will be tried or not.

If that situation should come to pass, it would be incumbent upon the District Court for the Southern District of Texas, and the District Court for the Western District of Texas each to exercise discretion as to which case should be tried. It may be that discretion so exercised would lead to the conclusion that the cases should be disposed of in the order of their filing. That would not be inconsonant with

[13] Cf. Lydick v. Fischer, 5 Cir. 1943, 135 F. 2d 983.

practices frequently observed.[11] The two courts would, of course, exercise discretion according to their own judgments. The suggestion is made merely to indicate that the Government's argument is wrong and that appellant does have a definite legal interest in the continued pendency of the first prosecution.

V

It is plain that we have all elements of this controversy before us and are able to do full justice to the parties independently of the question of the appealability of the dis- [fol. 296] missal order. It is clear that the Court of the Southern District applied the wrong tests in deciding that the indictment first brought might be dismissed. If it had required the Government to establish a sound legal reason for the dismissal, giving due consideration to the rights of both parties, it is difficult to conclude that the right to dismiss would have been sustained, so barren is the record of any such showing. When all of the talk is boiled down, it points to the fact that the Government was wholly displeased with the prospect of a trial in a venue the court had adjudicated to be fair.

That judgment transferring the case to the Laredo Division had been reached after full hearing and at manifestly great expense to the Government and appellant. To permit the Government to turn its back upon the entire proceeding conducted in a venue of its own selection, giving it, at the same time, a second choice of venue, and to put the appellant to trial with the added expense which would obviously be entailed, would, under the facts clearly appearing in the record before us, be unjust and in derogation of appellant's rights.

The authorities discussed in III *supra* furnish a clear blueprint of means by which we may do full justice between the parties. I think we should permit the Petition for Mandamus and Prohibition to be filed, and should take full charge of the entire litigation, either (a) preserving the *status quo* while proceeding to hear the appeal on its merits;

[11] Cf. Niehaus, et al v. Magnolia Textiles, 5 Cir. 1949, 175 F. 2d 977, and the companion case, Magnolia Textiles, Inc. v. Gillis, et al, Sup. Ct. Miss. 1949, 41 So. 2d 6.

or (b) reversing the dismissal order for rehearing by the Court of the Southern District guided by proper standards of proof and decision; or (c) ordering that the case in the [fol. 297] Western District be transferred to the Southern District and consolidated with the case originated there, and that trial proceed in the Laredo Division. By following one of these alternatives or a combination of them, we can proceed to grant appellant the protection to which I think he is entitled and can dispense justice which will be effective and not sterile.

These are the grounds of my dissent.

[fol. 298] Clerk's Certificate to foregoing Transcript omitted in printing.

[fol. 1] In the United States District Court for the Western District of Texas, San Antonio Division

No. 3866 Cr. (Austin) Cr. No. 20825

United States of America

v.

George B. Parr

Indictment—Filed in Clerk's office May 3, 1955

The Grand Jury Charges:

That on or about the 15th day of March, 1950, within the Austin Division of the Western District of Texas, and within the jurisdiction of this Court, one George B. Parr, late of San Diego, Texas, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1949, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Texas, at Austin, Texas, a false and fraudulent income tax return wherein he stated that his net income for said calendar year was the sum of

$49,075.04, and that the amount of tax due and owing thereon was the sum of $22,615.39, whereas, as he then and there well knew, his net income for the said calendar year was the sum of $96,457.96, upon which said net income he owed to the United States of America an income tax of $56,050.46.

[fol. 2] In violation of Section 145(b), Internal Revenue Code; 26 U.S.C., Section 145(b).

Second Count

That on or about the 15th day of March, 1951, within the Austin Division of the Western District of Texas, and within the jurisdiction of this Court, one George B. Parr, late of San Diego, Texas; did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1950, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Texas, at Austin, Texas, a false and fraudulent income tax return wherein he stated that his net income for said calendar year was the sum of $70,599.46, and that the amount of tax due and owing thereon was the sum of $38,312.60, whereas, as he then and there well knew, his net income for the said calendar year was the sum of $112,114.46, upon which said net income he owed to the United States of America an income tax of $70,570.76.

In violation of Section 145(b), Internal Revenue Code; 26 U.S.C., Section 145(b).

Third Count

That on or about the 17th day of March, 1952, within the Austin Division of the Western District of Texas, and within the jurisdiction of this Court, one George B. Parr, late of San Diego, Texas, did wilfully and knowingly attempt to evade and defeat a large part of the income tax [fols. 3-4] due and owing by him to the United States of America for the calendar year, 1951, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Texas, at Austin, Texas, a false and fraudulent income tax return

wherein he stated that his net income for said calendar year was the sum of $44,698.31, and that the amount of tax due and owing thereon was the sum of $22,628.23, whereas, as he then and there knew, his net income for the said calendar year was the sum of $70,713.86, upon which said net income he owed to the United States of America an income tax of $42,589.37.

In violation of Section 145(b), Internal Revenue Code; 26 U.S.C., Section 145(b).

(S.) G. Bedell Moore, Foreman of the Grand Jury,
(S.) Russell B. Wine, United States Attorney.

[fol. 5] IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

[Title omitted]

MOTION BY DEFENDANT TO STAY ARRAIGNMENT AND ALL SUBSEQUENT PROCEEDINGS—Filed in Clerk's office May 25, 1955

The defendant moves that the arraignment and any and all subsequent proceedings herein be stayed until final disposition of a case pending against him in the United States District Court for the Southern District of Texas, Laredo Division, entitled United States of America vs. George B. Parr, Chemical Action No. 6011, on the following grounds:

I

That an indictment identical except as to venue allegations with the indictment in this pending case was returned against this defendant in the Southern District of Texas, Corpus Christi Division, on November 15, 1954, being docketed as Criminal No. 6011, entitled United States of America vs. George B. Parr.

That the defendant George B. Parr was arraigned by Judge James V. Allred in the United States Courthouse at Corpus Christi on December 1, 1954, at which time he entered a plea of "not guilty."

[fol. 6] Within the time permitted by law and the orders of the Judge of said Corpus Christi Division, the defendant

George B. Parr on January 3, 1955, filed (1) his Motion for a Bill of Particulars, (2) his Motion for Discovery and Inspection, (3) his Motion for Subpoena Duces Tecum, and (4) his Motion to Change the Venue in this case under Rule 21(a) of the Federal Rules of Criminal Procedure from the Corpus Christi Division to the Laredo Division for trial. The Government joined issue on all these motions and they were taken under submission by the Court after the Court had first received evidence in the form of affidavits and counter-affidavits in support of and against the Motion for Change of Venue.

On April 27, 1955, a Memorandum by Judge T. M. Kennerly, concurred in by Judge James V. Allred, disposed of the aforesaid motions, which Memorandum was filed with the Clerk of the Corpus Christi Division on April 28, 1955. Formal orders directed by the Memorandum were entered on May 16, 1955, ordering the Government to furnish defendant with the particulars therein noted, ordering the Government to produce and permit inspection by defendant as therein set out, denying defendant's motion for subpoena duces tecum and transferring the case from the Corpus Christi Division, Southern District of Texas, to the Laredo Division, Southern District of Texas, for trial.

II

The indictment in this pending case was returned on [fol. 7] May 3, 1955.

On May 4, 1955, the Government under the authority of Rule 48(a) of the Federal Rules of Criminal Procedure filed with the Clerk of the Corpus Christi Division, Southern District of Texas, a Motion for Leave to Dismiss the Indictment then pending in the Southern District of Texas, Corpus Christi Division, ordered transferred to the Laredo Division, against George B. Parr, Criminal No. 6011. Attached to the Motion so filed was an authorization from the Attorney General and a Statement of Reasons for Dismissal.

On May 16, 1955, the defendant George B. Parr filed his Opposition to Government's Application for Leave to Dismiss and a hearing was thereupon had before Judge T. M. Kennerly to whom it was submitted by direction of Judge

James V. Allred by his Memorandum dated May 4, 1955.

The hearing before Judge Kennerly on said Motion to Dismiss and Defendant's Opposition thereto having been concluded, an order was entered without the consent and over the objection of defendant dismissing the case then pending in the United States District Court for the Southern District of Texas, Laredo Division.

III

On May 20, 1955, defendant George B. Parr in Criminal 6011 pending in the Southern District of Texas, Laredo Division, took an appeal from the Judgment of Dismissal entered by Judge T. M. Kennerly on May 19, 1955, to the Court of Appeals for the Fifth Circuit by filing with the [fol. 8] Clerk a Notice of Appeal in duplicate, Bond for Costs and Designation of Record on Appeal and by paying the fees, all in the manner and within the time prescribed by law and the Federal Rules of Criminal Procedure, and the Court of Appeals for the Fifth Circuit now has jurisdiction of said case.

(S.) Everett L. Looney, 1020 Brown Building, Austin 1, Texas. (S.) Thomas E. James, Capital Natl. Bank Bldg., Austin, Texas. (S.) Marvin K. Collie, Esperson Building, Houston, Texas. (S.) Clyde L. Wilson, Jr., Esperson Building, Houston, Texas, Attorneys for Defendant.

Duly sworn to by Everett L. Looney. Jurat omitted in printing.

[fols. 9-10] NOTICE OF MOTION (omitted in printing)

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 11] IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

Criminal No. 3866

UNITED STATES OF AMERICA,

vs.

GEORGE B. PARR

TRANSCRIPT OF EVIDENCE—June 7, 1955

Be it remembered that on the 7th day of June, 1955, at 1:30 p.m., in the San Antonio Division of the United States District Court, Western District of Texas, before the Honorable Ben H. Rice, Jr., Judge of said court, there came on to be heard defendant's motion to stay arraignment and all subsequent proceedings, whereupon the following evidence was introduced and the following proceedings were had:

APPEARANCES:

Mr. Malcolm R. Wilkey, United States Attorney, Houston, Texas; Mr. James T. Dowd, Assistant United States Attorney, Houston, Texas, appearing on behalf of the Government;

Looney, Clark & Moorhead, Austin, Texas, by Mr. Everett L. Looney and Mr. Thomas E. James appearing on behalf of the Defendant.

[fol. 12] COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Mr. Looney, are you ready to proceed?

Mr. Looney: Yes, sir.

The Court: All right, sir.

Mr. Looney: Your Honor, the matter to be submitted is the——

The Court: Mr. Looney, will you come up a little closer. It is difficult for me to hear you.

Mr. Looney: The matter to be considered is the first matter, and I hope the only matter to be considered this afternoon, is the motion which we filed on behalf of the

defendant George Parr; some few days prior to May 31st, the defendant filed a motion to stay the arraignment and all proceedings subsequent thereto. Subject to that motion and only in the event that it is overruled, he filed a motion to dismiss.

On May 31st, the defendant George B. Parr appeared at the bar, and by reason of the fact that Your Honor was busily engaged in trying a jury case, he was arraigned without the presentation first of the motion to dismiss, with the statement that such arraignment would be without prejudice to the presentation of the motion to stay and the motion to dismiss, if we reach that point.

Your Honor, a brief review of this case might be in order. On November 18th, 1954, the defendant Parr was indicted in the Corpus Christi Division of the Southern District for alleged violation of the income tax laws. On December 1st, 1954, the defendant George B. Parr was arraigned in the [fol. 13] Corpus Christi Division in the Southern District, and entered a plea of not guilty, after the court had first stated that he would be given until January 3rd within which to file any motions that he might think proper to be filed and to be considered. On January 3rd, 1955, the defendant filed a motion for a bill of particulars, a motion for production and inspection of documents, a motion for subpoena duces tecum and a motion to change the venue from the Corpus Christi Division to the Laredo Division in the Southern District, and at the same time the court had fixed limitation on the time of the defendant to file these motions, namely, January 3rd, he provided that the Government should have until January 24th within which to reply to any motion, or any briefs in support of any reply, if they so desire.

The defendant's motions were timely filed, all four of those motions, on January 3rd. Prior to January 24th, the court of his own motion entered an order extending the time both from the standpoint of the defendant and the Government, so that—I have forgotten the expiration date. Finally, all motions were submitted on briefs and affidavits, affidavits only as to the latter motion, the motion to change venue; the other is unsupported by affidavit to Judge Kennerly, for his decision. And on April 27th of this year,

Judge Kennerly handed down a memorandum opinion in which he disposed of all the pending motions, granted in part and declined in part the motion for bill of particulars, [fol. 14] granted in part and refused in part the motion for discovery and inspection, withheld action on the motion for subpoena duces tecum until such time as it was sought by the defendant after compliance with the inspection and copying of the instrument, production, inspection, and copying, unless they thought then they still needed a subpoena; and then he gave them the right to renew his motion at that time if he saw fit. And he sustained the motion to transfer the venue from Corpus Christi to Laredo and directed in his memorandum that orders should be entered in accordance with his written memorandum. That was April 27th.

That memorandum was filed in Corpus Christi on April 28th, 1955, and on May 3rd, if my memory serves me correctly, the same matters were submitted by the United States Attorney to the grand jury in session in the Western District at San Antonio, and an indictment identical in terms with the Corpus Christi indictment was returned by this grand jury here for the Austin Division, with the exception that some of the venue allegations had been deleted in the indictment that was returned here.

I make this preliminary statement because I think you can get it in this brief statement; it will help you understand and save time when we offer in support of our motion to dismiss some documentary evidence, which we do want to offer at this time before we argue.

Now, here is a list, if I might hand it up to the Court, a [fol. 15] list of the exhibits which we wish to offer.

Your Honor, the defendant offers as his Exhibit A the copy of the indictment that was returned in the Southern District of Texas, Corpus Christi Division, on November 15th—I stated a moment ago the 18th; it is November 15th, 1954. It isn't certified, but we had a pretrial discussion with the attorneys for the Government when we were last here, and it is agreed that it is a true copy of the indictment.

The Court: Is it so stipulated?

Mr. Wilkey: Your Honor, it is our position in regard to all of these documents, in regard to the proceeding in the

Southern District of Texas, that they are irrelevant to any proceeding in the Western District, for the simple reason, as shown by our authorities, a copy of which has been handed to the Court and to opposing counsel, that even if a proceeding was still pending and had not been dismissed in the Southern District, that that affords no bar to the proceeding going forward in the Western District. For that reason we consider them irrelevant. However, we have, in the interest of economy of time of both Court and counsel, and economy of money also, we have gone over these documents at the time you were over here on the 31st, I believe, and we are willing to agree, if assured that they are the same documents we examined, that they are true copies of the ones on file in the Southern District. We object to their legal relevancy or admissibility here.

[fols. 16-37] The Court: I will admit them.

Mr. Wilkey: They are true copies.

[fol. 38] DEFENDANT'S EXHIBIT I

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, CORPUS CHRISTI DIVISION

Criminal Action No. 6011

UNITED STATES OF AMERICA, Plaintiff

vs.

GEORGE B. PARR, Defendant

AMENDED MOTION OF DEFENDANT UNDER RULE 21(a) FEDERAL RULES OF CRIMINAL PROCEDURE FOR TRANSFER OF CASE FROM CORPUS CHRISTI DIVISION TO LAREDO DIVISION FOR TRIAL

To the said Honorable Judge of said Court:

Comes now the defendant, George B. Parr, by his attorneys, and upon the following grounds moves the Court under authority of Rule 21(a), Federal Rules of Criminal Procedure, for an order transferring the above numbered

and entitled case to the Laredo Division of the Southern District of Texas, so that all further proceedings in the matter, including trial, may be had in the Laredo Division, Southern District of Texas.

I

(a) This Division is composed of Aransas, Bee, Brooks, Duval, Jim Wells, Kennedy, Kleberg, Live Oak, Nueces and San Patricio Counties.

[fol. 39] The total population of the counties composing the Division is, according to the last preceding Federal Census, to-wit, 1950, 308,245, of which 165,471 reside in Nueces County, the county in which Corpus Christi is located.

Within said Division, since prior to 1948 and at all times subsequent thereto, The Corpus Christi Caller and The Corpus Christi Times have been and are the principal media of news.

The counties in the division, according to the last Federal Census, and the combined daily circulation of the Corpus Christi Caller and the Corpus Christi Times within each such county, according to the latest A. B. C. report made by the publishers of such newspapers on September 30, 1953, follows:

County	Population	Circulation
Aransas	4,252	698
Bee	18,174	1,221
Brooks	9,195	811
Duval	15,643	1,259
Jim Wells	27,991	3,024
Kennedy	632	
Kleberg	21,991	3,748
Live Oak	9,054	373
Nueces	165,471	59,076
San Patricio	35,842	5,886

From the foregoing, it appears that one of every 6 persons in Aransas County, one of every 15 persons in Bee County, one of every 11 persons in Brooks County, one of every 12 persons in Duval County, one of every 9 persons in Jim Wells County, one of every 6 persons in Kleberg County, one of every 24 persons in Live Oak County, one of less than 3 persons in Nueces County, and one of every [fol. 40] 6 persons in San Patricio County receive one or both of said newspapers daily.

One out of less than every 4 persons in the Corpus Christi Division receives one or both of said newspapers daily.

(b) The counties in the Laredo Division, according to the last Federal Census, and the combined daily circulation of the Corpus Christi Caller and the Corpus Christi Times within each such county, according to the latest A.B.C. report made by the publishers of such newspapers on September 30, 1953, follow:

County	Population	Circulation
Jim Hogg	5,389	229
LaSalle	7,485	.....
McMullen	1,187	.....
Webb	56,141	118
Zapata	4,405	.....

From the foregoing, it appears that one of every 24 persons in Jim Hogg County, no persons of 7485 in LaSalle County, no persons of 1187 in McMullen County, one of every 475 persons in Webb County, and no persons of 4405 in Zapata County receive one or both of said newspapers daily.

One out of every 206 persons in the Laredo Division receives one or both of said newspapers daily.

(c) These newspapers have continuously carried on, since prior to 1948, and now carry on a campaign of hate, vilification and abuse, consisting of published defamations, innuendos, distortions, half-truths, untruths and plain lies, directed at this defendant, all as will be hereinafter shown this Court at or before the hearing on this motion.

(d) Additionally, since February 18, 1948, there has [fol. 41] been continuously published within and circulated throughout this Division an English-Spanish weekly newspaper, called "La Verdad," of which one Santos de la Paz is editor and publisher. This last named publication has been during all such period of time likewise engaged in a campaign of hate, vilification and abuse, consisting of published defamations, innuedoes, distortions, half-truths, untruths and plain lies, directed against this defendant, even to the extent, as illustrative, of devoting two of its four pages, being the entire front page and the back page, of its February 5, 1954, issue, to convicting, by the means aforesaid, in the eyes and minds of its readers, this defendant, not only of the offense with which he stands charged in this

Court, but also of other and different offenses against the United States of America and the State of Texas, all as will be hereinafter shown this Court at or before the hearing on this motion.

II

For approximately two years next preceding the return of the indictment herein, agents of the Bureau of Internal Revenue, the Federal Bureau of Investigation, the United States Postal Service, the Department of Justice, the Attorney General of Texas, the Department of Public Safety, the State Auditor and numerous other boards and bureaus, unknown to this defendant but well known to the Government, have blanketed the whole, or practically the whole, of this entire Division purportedly, if not actually, attempting to convict this defendant in the eyes and minds of the inhabitants herein of every offense coming within [fols. 42-43] their respective jurisdictions.

III

The combination of all of the foregoing has created throughout this Division an inflammatory atmosphere by reason of which the defendant, if tried here, will be denied a fair and constitutional trial, since there exists in this Division and in each and every county comprising same so great a prejudice against this defendant that he cannot obtain a fair and impartial trial in this Division.

Written sworn statements of citizens residing in each county in the Division, supporting this paragraph III, will be presented at or before the hearing on this motion.

IV

Substantially the same conditions exist in the Brownsville Division, the Galveston Division, the Houston Division and the Victoria Division.

Dated this — day of January, 1955.

Respectfully submitted, Everett L. Looney, 1020 Brown Building, Austin 1, Texas; Thomas E. James, 1302 Capital National Bank Building, Austin, Texas; Marvin K. Collie; Clyde L. Wilson, Jr., Esperson Building, Houston 2, Texas, Attorneys for Defendant.

[fol. 44] (Filed in due course of time on Feb. 15, 1955. V. Bailey Thomas, Clerk.)

DEFENDANT'S EXHIBIT J

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, CORPUS CHRISTI DIVISION

Criminal No. 6011

UNITED STATES OF AMERICA,

v.

GEORGE B. PARR

REPLY TO DEFENDANT'S APPLICATION FOR CHANGE OF VENUE

Now comes the United States of America, by Malcolm R. Wilkey, United States Attorney for the Southern District of Texas, and in reply to application for change of venue of defendant, George B. Parr, would respectfully show the Court the following:

1. The defendant makes two basic assertions:

(1) That he cannot secure justice at Corpus Christi, and

(2) That he can secure justice only in Laredo.

The first, if true, would be valid ground for a change of venue. The second is unique.

The Sixth Amendment to the Constitution demands that [fol. 45] the defendant be tried in the district or division where the crime was committed. If he believes prejudice to exist, Rule 21(a) permits defendant to waive this constiutional guarantee and ask for transfer to another District or Division where a fairer climate of opinion may exist. Neither the Constitution nor Rule 21(a) states that "venue in all cases shall be in the District or division wherein the defendant prefers to be tried." If that is what is meant by the Constitution and Rule, it would have been simple to say so.

Defendant seeks to make his perfect choice by alleging that prejudice exists, not only at Corpus Christi, but at

Houston, Galveston, Brownsville, and Victoria. Impliedly, prejudice exists in all other Texas cities, for defendant nowhere suggests that venue be transferred to another District. According to defendant, *only* at Laredo can twelve impartial jurors be selected.

2. The alleged prejudice is claimed to arise from two sources:

(1) Three Newspapers, and
(2) Investigation by Government Agents.

The Government opines that such prejudice does not exist so as to entitle defendant under Rule 21(a) to a transfer from the Corpus Christi Division. The Government further asserts that if so great a prejudice exists as alleged by defendant, and analyzing the defendant's own named sources and undeniable facts, similar prejudice must exist in the Victoria, Laredo, and Brownsville Division. Relying on defendant's alleged facts, the logical conclusion must [fol. 46] follow that the defendant can obtain a fair trial in the Houston or Galveston Division, or outside the Southern District of Texas.

3. The Government desires a fair trial. The defendant has filed numerous affidavits; in substance stating that because of widespread unfavorable publicity given the defendant in the Corpus Christi Caller, Corpus Christi Times, and La Verdad, the affiants do not believe that the defendant can secure a fair trial in Corpus Christi. Newspaper clippings, presumably of the publicity referred to in the affidavits, have been filed. If this Honorable Court believes that the effect of the newspaper publicity is so great as to bar a fair trial, then the Government requests, on the basis of a moral compulsion, that this cause be transferred from Corpus Chrisi—but not to Laredo, Victoria, or Brownsville, which are infected by exactly the same virus of newspaper publicity. This cause should be transferred to Houston, Galveston, or some point outside the Southern District, where, according to defendant's own facts and theory, a fair and impartial trial may be had. A transfer to secure a *fair* trial the Government does not oppose.

4. Defendant's claim that a fair trial can be obtained in Laredo, but nowhere else, is surprising because the alleged

prejudice in Corpus Christi is said to arise from the influence of three newspapers. The combined circulation of said newspapers proportionate to population in Laredo [fol. 47] is not only greater, but *enormously greater* than in Houston or Galveston Divisions (Govt. Exhibit "A", "B", and "C"). *Fifty-one times as many persons per thousand population read one of these three papers in Laredo as in Houston.* (25.5 and .5 per thousand, respectively, Exhibit "C"). *Twenty times* as many persons per thousand population read one of these three papers in Laredo as in Galveston (25.5 and 1.27 per thousand, respectively, Exhibit "C").

5. Furthermore, the circulation figures per thousand population show Victoria (27.8), Laredo (25.8), and Brownsville (17.), to be in the same intensity of influence. If the defendant's fear of the prejudice created by these three newspapers is factually true, then Brownsville, Laredo and Victoria should be equally unacceptable to him. Only in Houston (.5) and Galveston (1.27) is the total circulation of the three papers practically negligible.

6. If defendant is sincere in his belief that prejudice has been created by the three newspapers, and is only desirous of securing a fair trial, as stated to this Court, then defendant should seek a transfer to the Houston Division, where the alleged baleful influence of these newspapers is only 1/51 as strong as at Laredo. The defendant's continued insistence on a transfer to Laredo is incongruous with facts when viewed under the light of circulation and population.

7. The Government unequivocally denies all allegations made by the defendant in Paragraph II of his Amended Motion referring to various agents of the United States of [fol. 48] America as having blanketed the whole, or practically the whole, of entire Divisions other than Laredo within the Southern District of Texas. An investigation was made of defendant, naturally centering in his Division of residence. Ancillary investigation was conducted in every Division of this District, including Laredo. If investigation produces prejudice, which the Government does not admit, then prejudice exists at Laredo in the same degree as at Corpus Christi, Houston, Galveston, Brownsville, or Victoria.

8. The Government points out that Under Rule 21(a),

Federal Rules of Criminal Procedure, the defendant bears the burden of proving to the satisfaction of the Court, not merely that some prejudice may exist in the minds of some people, but that the prejudice against him in the Division is so great that he cannot obtain a fair and impartial trial. The test is not whether *some*, or even *many*, people can be found who claim to know that prejudice against the defendant exists. The *test* is whether twelve fair and impartial jurors can be selected in the Corpus Christi Division. The Government, therefore, denies both the accuracy and *relevancy* of the allegations as to prejudice contained in defendant's Application and the affidavits in support.

9. *Publicity in itself is not prejudice.* The very fact that defendant's attorneys were able to find many persons who willingly gave their affidavits to assist defendant to secure a change of venue indicates that the publicity has created in these people, not prejudice, but some *sympathy* for this defendant.

[fol. 49] Would the defendant accept any of these affiants as jurors? We think he would. They have shown a desire to be fair to defendant, and would doubtless give him a fair trial.

10. If the defendant can find persons who are willing to make affidavits asking that the defendant be given what they consider a "fair" trial, he can find twelve fair and impartial jurors in the Corpus Christi Division. If the Court fears that the wellsprings of fair thought and honest men's consciences have been so polluted by the media named by the defendant, then this Court should transfer this cause—not to Laredo, Victoria, or Brownsville, where the same stream of alleged prejudice condemned by defendant has unquestionably reached—but to some point untouched by the prejudice described by defendant.

Respectfully submitted, (Signed.) Malcolm R. Wilkey, United States Attorney, (Signed.) James T. Dowd, Assistant United States Attorney.

CERTIFICATE OF SERVICE

I hereby certify that this answer in opposition to motion has been served upon the defendant George B. Parr by delivering a true copy of same to the office of Marvin K.

Collie, Attorney of Record for Defendant Parr, Esperson Building, Houston, Texas.

(Signed) James T. Dowd, Assistant United States Attorney.

February, 1955.

[fol. 50] AFFIDAVIT

STATE OF TEXAS,
County of Nueces:

I, Santos De La Paz, Publisher, La Verdad, Corpus Christi, Texas, upon oath do depose and say as follows:

From the circulation records of La Verdad, which are kept under my direct supervision, the number of copies of La Verdad, net paid circulation, for the month of December, 1954, which were distributed in certain counties in Texas, is as follows:

County	La Verdad
Brazos	3
Colorado	2
Fayette	4
Grimes	6
Harris	23
Madison	3
Montgomery	4
Polk	2
San Jacinto	9
Trinity	2
Walker	4
Waller	3
Austin	40
Brazoria	3
Chambers	2
Fort Bend	2
Galveston	5
Matagorda	6
Wharton	10
Calhoun	12
Dewitt	6
Goliad	5
Jackson	2
Lavaca	6
Refugio	32
Victoria	20
Aransas	80
Bee	62
Brooks	8
Duval	954
Jim Wells	150

[fol. 51]

County	La Verdad
Kenedy	3
Kleberg	12
Live Oak	"
Nueces	600
San Patricio	32
Jim Hogg	25
LaSalle	3
McMullen	2
Webb	953
Zapata	35
Cameron	72
Hidalgo	63
Starr	125
Willacy	20

Subscribed and sworn to before me this — day of January, 1955. ——— ———, Notary Public in and for Nueces County, Texas.

STATE OF TEXAS,
County of Nueces:

I, Clayton Grant, Circulation Manager of the Corpus Christi Caller and Corpus Christi Times, Corpus Christi, Texas, upon oath do depose and say as follows:

From the circulation records of the Corpus Christi Caller and the Corpus Christi Times, which are kept under my direct supervision, the number of copies of each newspaper, net paid circulation, for the month of ———, 1954, which were distributed in certain counties in Texas, is as follows:

County	Morning Caller	Evening Times
Brazos	Less than 25	Less than 25
Colorado	" " "	" " "
Fayette	" " "	" " "
Grimes	" " "	" " "

[fol. 52]

Harris	Less than 48	Less than 2
Madison	Less than 25	Less than 25
Montgomery	" " "	" " "
Polk	" " "	" " "
San Jacinto	" " "	" " "
Trinity	" " "	" " "
Walker	" " "	" " "
Austin	" " "	" " "
Brazoria	" " "	" " "
Chambers	" " "	" " "
Fort Bend	" " "	" " "
Galveston	" " "	" " "
Matagorda	" " "	" " "
Wharton	" " "	" " "
Calhoun	Less than 248	Less than 37
Dewitt	101	None

County	Morning Caller	Evening Times
Goliad	182	10
Jackson	5	None
Lavaca	Less than 25	Less than 25
Refugio	1,389	255
Victoria	780	85
Aransas	374	321
Bee	1,379	195
Brooks	720	160
Duval	1,102	308
Jim Wells	2,585	673
Kenedy	17	None
Kleberg	2,599	1,833
Live Oak	446	
Nueces County	32,143	29,982
Patricio	3,038	2,196
Jim Hogg	240	None
LaSalle	Less than 25	Less than 25
McMullen	12	None
Webb	569	None
Zapata	23	"
Cameron	1,837	"
Hidalgo	2,469	"
Starr	262	"
Willacy	593	"

Subscribed and sworn to before me this — day of January, 1955. ———, Notary Public in and for Nueces County, Texas.

[fol. 53]

Population		Circulation Corpus Christi Morning Caller	Circulation Per 1,000	Circulation Corpus Christi Evening Times	Circulation Per 1,000	Circulation La Verdad	Circulation Per 1,000	Total Circulation Per 1,000 (Ignoring Duplication)
Houston Division								
Brazos	38,390	20		20		3		
Colorado	17,576	20		20		2		
Fayette	24,176	20		20		4		
Grimes	15,135	20		20		6		
Harris	806,701	48		2		23		
Madison	7,996	20		20		3		
Montgomery	24,504	20		20		4		
Polk	16,194	20		20		2		
San Jacinto	7,172	20		20		9		
Trinity	10,040	20		20		2		
Walker	20,163	20		20		4		
Waller	11,961					3		
	1,000,008	248	24	202	20	65	06	50
Galveston Division								
Austin	14,663	20		20		40		
Brazoria	46,549	20		20		3		
Chambers	7,871	20		20		2		
Fort Bend	31,056	20		20		2		
Galveston	113,066	20		20		5		
Matagorda	21,559	20		20		6		
Wharton	36,077	20		20		10		
	270,841	140	51	140	51	68	25	1 3
Victoria Division								
Calhoun	9,222	248		37		12		
DeWitt	22,973	101				6		
Goliad	6,219	182		10		5		
Jackson	12,916	5				2		
Lavaca	22,159	20		20		6		
Refugio	10,113	1,389		255		32		
Victoria	31,241	780		85		20		
	114,843	2,725	23 8	407	3 8	83	72	28 3

[fol. 54]

Corpus Christi Division									
Aransas	4,252	374		321		80			
Bee	18,174	1,379		195		62			
Brooks	9,195	720		160		8			
Duval	15,643	1,102		308		954			
Jim Wells	27,991	2,585		673		150			
Kenedy	632	17				3			
Kleberg	21,991	2,599		1,833		12			
Live Oak	9,054	445				7			
San Patricio	35,842	4,038		2,196		30			
Nueces	165,472	32,143		29,982		600			
	308,245	45,403	147	35,668	116	1,906	6.17	269.2	
Laredo Division									
Jim Hogg	5,389	240				25			
LaSalle	7,485	20		20		3			
McMullen	1,187	12				2			
Webb	56,141	569				953			
Zapata	4,405	23				35			
	74,607	864	11.6	20	.26	1,018	13.64	25.5	
Brownsville Division									
Cameron	125,170	1,837				72			
Hidalgo	160,446	2,469				63			
Starr	13,948	262				125			
Willacy	20,920	593				20			
	320,484	5,161	16.1			280	87	17	

ORDER ALLOWING CERTIORARI—Filed October 17, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case will be heard on the merits and on the question of appealability.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(5790-1)

No. 202

Office - Supreme Court, U. S.
FILED
JUL 1955
HAROLD B. WILLEY, Clerk

United States Court of Appeals

FOR THE SECOND CIRCUIT.

MICHAEL STELLA, on behalf of himself and all other stockholders of Kaiser-Frazer Corporation,

Plaintiff-Appellant,

—against—

HENRY J. KAISER, JOSEPH W. FRAZER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MacDONALD, O. B. MOTTER, HICKMAN PRICE, JR., WALSTON S. BROWN and KAISER-FRAZER CORPORATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPENDIX TO BRIEF OF APPELLANT.

LEWIS M. DABNEY, JR.,
Attorney for Appellant.

THE COURT PRESS 130 Cedar St., N. Y. C.

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United States Court of Appeals

FOR THE SECOND CIRCUIT.

MICHAEL STELLA, on behalf of himself and all other stockholders of Kaiser-Frazer Corporation,

Plaintiff-Appellant,

—against—

HENRY J. KAISER, JOSEPH W. FRAZER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., WALSTON S. BROWN and KAISER-FRAZER CORPORATION,

Defendants-Appellees.

Statement Pursuant to Rule 15(b).

1. The action was commenced on May 10, 1948, on which day the complaint was filed in the Office of the Clerk of the United States District Court for the Southern District of New York.

2. The original parties were Michael Stella, on behalf of himself and all other stockholders of Kaiser-Frazer Corporation, Plaintiff, and Henry J. Kaiser, Joseph W. Frazer, Edgar F. Kaiser, G. G. Sherwood, E. E. Trefethen, Jr., Clay P. Bedford, W. A. MacDonald, O. B. Motter, Hickman Price, Jr., Walston S. Brown and Kaiser-Frazer Corporation, Defendants. There has been no change of parties.

3. The respective pleadings were filed as follows:

The complaint on May 10, 1948; the answer of defendants, Henry J. Kaiser, Edgar F. Kaiser, G. G. Sherwood, E. E. Thefethen, Jr., Clay P. Bedford, O. B. Motter,

Statement Pursuant to Rule 15(b).

Hickman Price, Jr., and Walston S. Brown, on September 17, 1948; the answer of Kaiser-Frazer Corporation was filed September 17, 1948, the answer of W. A. MacDonald was filed November 16, 1948, and the answer of Joseph W. Frazer was filed February 14, 1949.

4. No property has been attached.

5. There was no trial herein. On February 11, 1954 the Hon. Sylvester J. Ryan, United Staes District Judge, rendered his opinion to the effect that summary judgment should be granted dismissing the complaint.

6. No question was referred to a Commissioner or Commissioners, Master or Referee.

7. Final judgment was entered herein February 19, 1954.

8. Notice of appeal from said judgment was duly filed March 18, 1954.

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion.

ORDER TO SHOW CAUSE.

(Cert. tr., pp. 46-47.)

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE EASTERN DISTRICT OF MICHIGAN,

SOUTHERN DIVISION.

Civil No. 7354.

JEROME R. PERGAMENT and GEORGE J. LONDON, suing on their own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated and in the right of and on behalf of Kaiser-Frazer Corporation,

Plaintiffs,

—against—

JOSEPH W. FRAZER, HENRY J. KAISER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., GRAHAM-PAIGE MOTORS CORPORATION, OTIS & CO., CYRUS EATON, THE PERMANENTE METALS CORPORATION, PERMANENTE PRODUCTS COMPANY, UNITED STATES OF AMERICA, RECONSTRUCTION FINANCE CORPORATION and KAISER-FRAZER CORPORATION,

Defendants.

Upon the annexed duly verified petition of Jerome R. Pergament, George J. London and Kaiser-Frazer Corpo-

ration, and upon all prior pleadings and proceedings herein, it is

ORDERED, that the parties to this action and the stockholders of the defendant Kaiser-Frazer Corporation show cause at a Term of this Court, to be held at Room 712 of the Federal Building, 231 W. Lafayette Street, in the City of Detroit, State of Michigan, on the 6th day of December, 1949, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made

(a) approving the agreement between the plaintiffs, the defendant Kaiser-Frazer Corporation, and the defendants Joseph W. Frazer, Henry J. Kaiser, Edgar F. Kaiser, Clay P. Bedford, W. A. MacDonald, Hickman Price, Jr., The Permanente Metals Corporation and Permanente Products Company, dated October 25, 1949, a copy of which is annexed to said petition marked Exhibit 1;

(b) directing that the said agreement be carried out and put into effect;

(c) fixing a date for the submission of applications for allowance of fees and expenses for plaintiffs' attorneys;

(d) providing, upon compliance with the terms of said agreement to the satisfaction of the Court, for the entry of a judgment dismissing the action, with a reservation of jurisdiction solely for the purpose of hearing and determining applications for allowances of fees and expenses for plaintiffs' attorneys and directing the payment thereof;

Exhibit 1, Annexed to Affidavit of Mark F. Hughes.

(e) granting such other, further and different relief as to the Court may seem just and proper;

and, sufficient reason appearing therefor, it is further

ORDERED, that service of a copy of this order to show cause and the annexed petition upon the attorneys of record of the respective defendants, whose offices are located within this District, on or before the 15th day of November, 1949, be deemed good and sufficient service upon said defendants, and it is further

ORDERED, that a copy of this order, of the annexed petition, of a notice of hearing in substantially the form hereto annexed marked Exhibit A, of the amended complaint and of the plaintiffs' notice of motion to amend and supplement the amended complaint, be mailed on or before the 21st day of November, 1949, by the defendant Kaiser-Frazer Corporation to each of the stockholders of said defendant of record as of the 31st day of October, 1949, and that for that purpose, the said defendant Kaiser-Frazer Corporation shall print a sufficient number of copies of this order, the annexed petition, said notice of hearing, said amended complaint and said notice of motion to amend and supplement said amended complaint, and it is further

ORDERED, that a notice substantially in the form of Exhibit A annexed to this order be published once by the defendant Kaiser-Frazer Corporation on or before the 23rd day of November, 1949, in the following newspapers of general circulation: the Detroit Legal News in the City of Detroit, Michigan, the New York Times in the City of New York, N. Y., the Chicago Daily News in the City of Chicago, Illinois, the San Francisco Chronicle in

the City of San Francisco, California, and the Reno Evening Gazette in the City of Reno, Nevada, and it is further

ORDERED, that the mailing of a copy of this order, the annexed petition, said notice of hearing, said amended complaint and said notice of motion to amend and supplement said amended complaint and the publication of said notice of hearing as hereinabove prescribed shall be deemed sufficient service upon and notice to the stockholders of the defendant Kaiser-Frazer Corporation pursuant to Rule 23 (d) of the Rules of Civil Procedure.

Dated, Detroit, Michigan, November 9th, 1949.

FRANK A. PICARD
United States District Judge

Exhibit 1, Annexed to Affidavit of Mark T. Hughes.

PETITION

(Cert. tr., pp. 49-52.)

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE EASTERN DISTRICT OF MICHIGAN,

SOUTHERN DIVISION.

Civil No. 7354.

JEROME R. PERGAMENT and GEORGE J. LONDON, suing on their own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated and in the right of and on behalf of Kaiser-Frazer Corporation,

Plaintiffs,

—against—

JOSEPH W. FRAZER, HENRY J. KAISER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., GRAHAM-PAIGE MOTORS CORPORATION, OTIS & CO., CYRUS EATON, THE PERMANENTE METALS CORPORATION, PERMANENTE PRODUCTS COMPANY, UNITED STATES OF AMERICA, RECONSTRUCTION FINANCE CORPORATION and KAISER-FRAZER CORPORATION,

Defendants.

To the Honorable the Judges of the United States District Court for the Eastern District of Michigan:

The petition of Jerome R. Pergament and George J. London, by Samuel L. Chess and Fischer & Fischer and

Exhibit 1, Annexed to Affidavit of Mark F. Hughes.

Perlman, Goodman, Hecht & Chesler, their attorneys, and of Kaiser-Frazer Corporation, by its attorneys, Butzel, Eaman, Long, Gust & Kennedy and Willkie Owen Farr Gallagher & Walton, respectfully shows to the Court as follows:

1. That your petitioners, Jerome R. Pergament and George J. London, are the plaintiffs in the above-entitled action and that your petitioner, Kaiser-Frazer Corporation, is a defendant in said action.

2. The defendants Edgar F. Kaiser, Clay P. Bedford, W. A. MacDonald, Hickman Price, Jr. and Kaiser-Frazer Corporation have appeared and answered. That the defendants, The Permanente Metals Corporation and Permanente Products Company have not yet answered. That by a memorandum and order entered October 12, 1949, this action has been dismissed as against the defendants United States of America and Reconstruction Finance Corporation. That the defendant Otis & Co. has been served with a summons and complaint and has made a motion to dismiss the action and to quash the return of service of process, which motion is now pending undecided. That the remaining named defendants have not been served with the summons and complaint. That the defendants Joseph W. Frazer, Henry J. Kaiser, Edgar F. Kaiser, Clay P. Bedford, W. A. MacDonald and Hickman Price, Jr. are hereinafter collectively referred to as the "individual defendants."

3. That on October 22, 1949, your petitioners, Jerome R. Pergament and George J. London, as plaintiffs herein, served and filed a notice of motion to amend and supplement the amended complaint at the opening of the trial

of the action so as to include alleged acts of misfeasance and neglect on the part of the individual defendants and others, not theretofore alleged in the amended complaint, resulting in loss and damage to your petitioner, the defendant Kaiser-Frazer Corporation.

4. That on October 25, 1949, your petitioners, Jerome R. Pergament and George J. London, as plaintiffs herein, and acting on behalf of themselves and on behalf of all other stockholders of the defendant Kaiser-Frazer Corporation, entered into a written agreement with your petitioner, the defendant Kaiser-Frazer Corporation, and with the individual defendants and the defendants The Permanente Metals Corporation and Permanente Products Company to dismiss and compromise this action and the claims set forth in the amended complaint and the aforesaid notice to amend and supplement the amended complaint upon the terms and conditions therein provided; including, among others, the condition that the compromise therein provided for shall be approved by this court in accordance with the provisions of Rule 23(c) of the Rules of Civil Procedure. Annexed hereto, marked Exhibit 1, is a true copy of said agreement; and annexed hereto, marked Exhibit 2, is a list of the metal presses and related equipment referred to in paragraph 1 (d) of said agreement.

5. That, in the opinion of your petitioners, said agreement provides for a fair and reasonable disposition of the claims and matters in controversy in this action and that it is in the interest of your petitioner, the defendant Kaiser-Frazer Corporation, and of your petitioners, Jerome R. Pergament and George J. London, and of all other stockholders of the defendant Kaiser-Frazer Corporation that said agreement be approved by this Court

pursuant to said Rule 23(c) and that the provisions of said agreement be carried out and put into effect.

6. That it is necessary and desirable that a hearing be held by this Court to consider said agreement and thereupon to make such order in the premises as may be just and proper, and that appropriate notice of such hearing be given to all of the parties of record and to all of the stockholders of record of the defendant Kaiser-Frazer Corporation—for all of which an order to show cause is requested.

7. That no previous application for the relief herein requested has been made to any other court or judge.

WHEREFORE, your petitioners pray

1. That an order be entered (a) approving the agreement, Exhibit 1 hereto annexed; (b) directing that the same be carried out and put into effect; (c) fixing a date for the submission of applications for allowance of fees and expenses for plaintiffs' attorneys; and (d) providing, upon compliance with the terms of said agreement to the satisfaction of the Court, for the entry of a judgment dismissing the action, with a reservation of jurisdiction solely for the purpose of hearing and determining applications for allowances of fees and expenses for plaintiffs' attroneys and directing the payment thereof.

2. That an order to show cause issue fixing a time and place for a hearing upon this petition, and providing for appropriate notice to all the stockholders of the defendant Kaiser-Frazer Corporation of the time, place and purpose of said hearing; and

3. That the court grant to your petitioners such other,

further and different relief as to the Court may seem just and proper.

JEROME R. PERGAMENT
GEORGE J. LONDON
Plaintiffs-Petitioners.

SAMUEL L. CHESS
Samuel L. Chess,
17 John Street,
New York 7, N. Y.

FISCHER & FISCHER,
By Kenneth Fischer
Member of the Firm,
2320 Guardian Building,
Detroit 26, Michigan.

PERLMAN, GOODMAN, HECHT & CHESLER,
10 South LaSalle Street,
Chicago, Illinois.

Attorneys for Plaintiffs-Petitioners.

KAISER-FRAZER CORPORATION,
By J. F. Reis
Vice-President,
Defendant-Petitioner.

BUTZEL, EAMAN, LONG, GUST & KENNEDY,
By A. Hilliard Williams
Member of the Firm
1881 National Bank Building,
Detroit 26, Michigan.

WILLKIE OWEN FARR GALLAGHER & WALTON,
15 Broad Street,
New York 5, New York,

Attorneys for Defendant-Petitioner,
Kaiser-Frazer Corporation.

Exhibit 1, Annexed to Affidavit of Mark F. Hughes.

State of New York,
County of New York—ss.:

JEROME R. PERGAMENT, being duly sworn, deposes and says that he is one of the plaintiffs-petitioners herein; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

JEROME R. PERGAMENT

Sworn to before me this
2 day of November, 1949.

ANNA K. ROSENTHAL
Notary Public.

ANNA K. ROSENTHAL
Notary Public, State of New York
Residing in Bronx Co. No. 84, Reg. No. 233-R-0
Cert. filed in N. Y. Co. No. 296, Reg. No. 241-R-0
Commission Expires March 30, 1950

(NOTARIAL SEAL)

(County Clerk's Certificate Attached)

State of New Jersey,
County of Hudson—ss.:

GEORGE J. LONDON, being duly sworn, deposes and says that he is one of the plaintiffs-petitioners herein; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge except

Exhibit 1, Annexed to Affidavit of Mark F. Hughes.

as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

GEORGE J. LONDON

Sworn to before me this
3 day of November, 1949.

BENJAMIN KIRSHBAUM
Notary Public.
My Commission Expires March 7, 1952

(NOTARIAL SEAL)

(County Clerk's Certificate Attached)

State of Michigan,
County of Wayne—ss.:

J. F. REIS, being sworn, deposes and says that he is Vice-President of Kaiser-Frazer Corporation, defendant-petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

J. F. REIS.

Sworn to before me this
7th day of November, 1949.

ELIZABETH V. HAND
Notary Public, Wayne County, Michigan
My Commission Expires April 7, 1951.

(NOTARIAL SEAL)

Exhibit 1, Annexed to Affidavit of Mark F. Hughes.

EXHIBIT 1

(Cert. tr., pp. 53-58.)

THIS AGREEMENT made and entered into as of this 25th day of October, 1949, by and between JEROME R. PERGAMENT and GEORGE J. LONDON (hereinafter called "the plaintiffs") and JOSEPH W. FRAZER, HENRY J. KAISER, EDGAR F. KAISER, CLAY P. BEDFORD, W. A. MACDONALD and HICKMAN PRICE, JR. (hereinafter called "the individual defendants") and THE PERMANENTE METALS CORPORATION and PERMANENTE PRODUCTS COMPANY (hereinafter called "the corporate defendants") and KAISER-FRAZER CORPORATION (hereinafter called "Kaiser-Frazer").

WITNESSETH:

WHEREAS, the plaintiffs have heretofore filed and there is now pending in the United States District Court for the Eastern District of Michigan an action on their own behalf and on behalf of all other stockholders of Kaiser-Frazer similiarly situated and in the right of and on behalf of Kaiser-Frazer, which action is entitled "Jerome R. Pergament and George L. London, suing on their own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated and in the right of and on behalf of Kaiser-Frazer Corporation, Plaintiffs, against Joseph W. Frazer, Henry J. Kaiser, Edgar F. Kaiser, G. G. Sherwood, E. E. Trefethen, Jr., Clay P. Bedford, W. A. MacDonald, O. B. Motter, Hickman Price, Jr., Graham-Paige Motors Corporation, Otis & Co., Cyrus Eaton, The Permanente Metals Corporation, Permanente Products Company, United States of America, Reconstruction Finance Corporation and Kaiser-Frazer Corporation, Defendants", Civil No. 7354, which action is

hereinafter referred to as "the stockholders derivative action", and

WHEREAS, on or about the 22nd day of October, 1949, the plaintiffs served a notice of intention to amend and supplement the amended complaint so as to include additional allegations and prayers for relief, and

WHEREAS, subject to the approval of the Court pursuant to the provisions of Rule 23(c) of the Federal Rules of Civil Procedure, the parties desire to dismiss and compromise the stockholders derivative action and to resolve all of the controversies raised by the allegations of the amended complaint and the notice of intention to amend and supplement the amended complaint and the answers thereto, together with any and all matters or claims hereinafter referred to, and

WHEREAS, the plaintiffs deem it in the best interest of Kaiser-Frazer and all of the stockholders of Kaiser-Frazer that the stockholders derivative action be dismissed and compromised upon the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the premises and of the mutual promises and agreements of the parties hereinafter set forth, the parties agree as follows:

1. The individual defendants and the corporate defendants will do or cause to be done the following:

(a) The giving of guaranties by Henry J. Kaiser Company, a Nevada corporation, and Kaiser-Industries, Inc., a Nevada corporation, to the extent in the aggregate of $15,000,000 of

(i) payment of interest on and principal of a certain loan to be obtained from Reconstruction

Exhibit 1, Annexed to Affidavit of Mark F. Hughes.

Finance Corporation by Kaiser-Frazer in the principal amount of not to exceed $34,400,000 bearing interest at the rate of 4% per annum and repayable over a period of approximately ten years, all subject to such terms and conditions as may be agreed to between Kaiser-Frazer and Reconstruction Finance Corporation, and

(ii) the payment by Kaiser-Frazer Sales Corporation, a wholly owned subsidiary of Kaiser-Frazer, of interest on and principal of such sums as said Kaiser-Frazer Sales Corporation may from time to time borrow under a $10,000,000 revolving line of credit to be in effect for a period of approximately one year and a half, as established by Reconstruction Finance Corporation pursuant to agreement to be entered into between said Kaiser-Frazer Sales Corporation and Reconstruction Finance Corporation,

such guaranties to be upon such terms as may be agreed to between said Henry J. Kaiser Company and Kaiser Industries, Inc. and Reconstruction Finance Corporation.

(b) The pledging by said Henry J. Kaiser Company and Kaiser Industries, Inc. of collateral having a sound value in the opinion of the Board of Directors of said Reconstruction Finance Corporation, of not less than $10,000,000 to secure the performance of the guaranties referred to in sub-paragraph (a) of this paragraph 1, all as may be agreed to between said Henry J. Kaiser Company and Kaiser Industries, Inc. and Reconstruction Finance Corporation.

(c) The payment to Kaiser-Frazer of the sum of $500,000.

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(d) The purchase from Kaiser-Frazer by Kaiser Metal Products, Inc. of certain metal presses and related equipment located in the plant of Kaiser Metal Products, Inc. at Bristol, Pa., for an amount equal to the value of such presses as shown on the books and records of Kaiser-Frazer as of September 30, 1949, to wit, the sum of $879,303.30.

2. Subject only to the provisions of paragraph 7 hereof, Kaiser-Frazer and the plaintiffs on their own behalf and on behalf of all other stockholders of Kaiser-Frazer similarly situated and in the right of and on behalf of Kaiser-Frazer and in their own right hereby agree to release and discharge and hereby do release and forever discharge the individual defendants; the corporate defendants and G. G. Sherwood, E. E. Trefethen, Jr., H. C. McCaslin, O. B. Motter, Walston S. Brown, Theodore V. Houser, J. F. Reis, Michael Miller, R. H. Hetrick, T. M. Price, Henry J. Kaiser, Jr., Graham-Paige Motors Corporation, a Michigan corporation, Kaiser Steel Corporation (formerly known as Kaiser Company, Inc.), a Nevada corporation, Kaiser Metal Products, Inc. (formerly known as Kaiser Fleetwings, Inc., and Kaiser Cargo, Inc.), a California corporation, Henry J. Kaiser Company, a Nevada corporation, Kaiser Industries, Inc. (formerly known as Kaiser Engineers, Inc.), a Nevada corporation, Kaiser Services, a California corporation, Underwriters Service, Inc., a California corporation, their heirs, executors, administrators, successors and assigns, as well as their officers, agents and employees, of all and from all, and all manner of action and actions, cause and causes of actions, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses,

damages, judgments, extents, executions, claims and demands whatsoever in law or in equity, which against said individual defendants, corporate defendants and G. G. Sherwood, E. F. Trefethen, Jr., H. C. McCaslin, O. B. Motter, Walston S. Brown, Theodore V. Houser, J. F. Reis, Michael Miller, R. H. Hetrick, T. M. Price, Henry J. Kaiser, Jr., Graham-Paige Motors Corporation, a Michigan corporation, Kaiser Steel Corporation (formerly known as Kaiser Company, Inc.), a Nevada corporation, Kaiser Metal Products, Inc. (formerly known as Kaiser Fleetwings, Inc. and Kaiser Cargo, Inc.), a California corporation, Henry J. Kaiser Company, a Nevada corporation, Kaiser Industries, Inc. (formerly known as Kaiser Engineers, Inc.), a Nevada corporation, Kaiser Services, a California corporation, Underwriters Service, Inc., a California corporation, their heirs, executors, administrators, successors and assigns, as well as their officers, agents and employees, said Kaiser-Frazer and the plaintiffs on their own behalf and on behalf of all other stockholders of Kaiser-Frazer similarly situated and in the right of and on behalf of Kaiser-Frazer and in their own right, ever had, now have or which they or their heirs, executors, administrators, successors and assigns, hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the date of these presents, including without limitation of the generality of the foregoing any and all claims, charges and allegations set forth in the amended complaint and the notice to amend and supplement the amended complaint including

(a) The purchase or authorization of the purchase by Kaiser-Frazer Corporation on or about February 3, 1948 of 186,200 shares of the common stock of Kaiser-Frazer.

Exhibit 1, Annexed to Affidavit of Mark F. Hughes.

(b) All acts and transactions relating to or in connection with a proposed offering of common stock of Kaiser-Frazer, a Registration Statement covering which was made effective by the Securities and Exchange Commission on February 3, 1948.

(c) The making of certain contracts dated September 20, 1946, December 1, 1947 and December 12, 1947 between Kaiser-Frazer and Graham-Paige Motors Corporation, including all agreements supplementary and amendatory thereof and all acts and transactions under or in connection therewith, and in addition each and every transaction between Graham-Paige Motors Corporation and Kaiser-Frazer and payments made on account thereof.

(d) The following transactions of The Permanente Metals Corporation:

(i) The assignment by Kaiser-Frazer Corporation to The Permanente Metals Corporation of a certain letter of intent dated March 27, 1946 covering the proposed lease of Plancors Nos. 524 and 1061 from War Assets Administration to Kaiser-Frazer, and the subsequent lease and purchase of said Plancors Nos. 524 and 1061 by The Permanente Metals Corporation.

(ii) The procurement by Kaiser Metal Products, Inc. of a letter of intent with reference to a certain aluminum reduction plant at Head, Washington, the subsequent assignment of said letter of intent to The Permanente Metals Corporation, and the subsequent lease and acquisition of said plant by The Permanente Metals Corporation.

(iii) The procurement by The Permanente Metals Corporation of a letter of intent with reference to a certain alumina plant at Baton Rouge,

Louisiana, and the subsequent lease and acquisition of said plant by The Permanente Metals Corporation.

(iv) The procurement by The Permanente Metals Corporation of a letter of intent to purchase an aluminum fabricating plant at Newark, Ohio, and the subsequent purchase thereof by The Permanente Metals Corporation.

(v) All other transactions between Kaiser-Frazer and The Permanente Metals Corporation, including, without limitation of the generality of the foregoing purchases of aluminum by Kaiser-Frazer from The Permanente Metals Corporation; and all acts and transactions in anywise connected therewith of the individual defendants, the corporate defendants and the other persons and corporations hereinabove in this paragraph 2 mentioned.

(e) All transactions whereunder Kaiser-Frazer leased a certain plant located at Long Beach, California from War Assets Administration, operated such plant, paid rentals thereon, maintained the same and manufactured farm equipment therein for Graham-Paige Motors Corporation, and all acts and transactions in anywise connected therewith of the individual defendants, the corporate defendants and the other persons and corporations hereinabove in this paragraph 2 mentioned.

(f) All transactions between Kaiser-Frazer and Kaiser Metal Products, Inc., including, without limitation of the generality of the foregoing, transactions whereby Kaiser-Frazer paid the cost of experimental work incurred by Kaiser Metal Products, Inc., paid the cost of equipment acquired and installed in the plant of said Kaiser Metal Products,

Inc., released an option to buy the plant of Kaiser Metal Products, Inc. at Bristol, Pa., permitted to remain in said plant certain equipment owned by Kaiser-Frazer and purchased, at prices claimed to have been excessive, automotive parts from Kaiser Metal Products, Inc., and all acts and transactions in anywise connected therewith of the individual defendants, corporate defendants and the other persons and corporations hereinabove in this paragraph 2 mentioned.

(g) All transactions between Kaiser-Frazer and Kaiser Steel Corporation, including, without limitation of the generality of the foregoing, transactions whereby Kaiser-Frazer purchased certain steel products from Kaiser Steel Corporation and entered into and maintained in effect a management contract for the operation of a certain blast furnace at Provo, Utah, and all acts and transactions in anywise connected therewith of the individual defendants, the corporate defendants and the other persons or corporations hereinabove in this paragraph 2 mentioned.

(h) All transactions between Kaiser-Frazer and Kaiser Industries, Inc., including, without limitation of the generality of the foregoing, transactions whereunder Kaiser-Frazer obtained engineering services from Kaiser Industries, Inc., and all acts and transactions in anywise connected therewith of the individual defendants, the corporate defendants and other persons or corporations hereinabove in this paragraph 2 mentioned.

(i) The transaction whereunder Kaiser-Frazer on or about December 27, 1947 repaid in full the outstanding principal amount of a loan made to Kaiser-

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Frazer by Bank of America, National Trust and Savings Association, including all acts and transactions in anywise connected therewith of the individual defendants, the corporate defendants, and the other persons or corporations hereinabove in this paragraph 2 mentioned.

3. Nothing contained in this agreement shall in anywise release or discharge Otis & Co. or any officer, director or stockholder of Otis & Co. from any claim Kaiser-Frazer may have against any one or more of them, including, without limitation of the generality of the foregoing, the action instituted by Kaiser-Frazer against Otis & Co. in the United States District Court for the Southern District of New York entitled "Kaiser-Frazer Corporation, plaintiff, against Otis & Co., defendant", Civil Action No. 45-564, and a certain counterclaim and third party complaint against James F. Masterson, Otis & Co., Cyrus S. Eaton, et al., in an action entitled "James F. Masterson, plaintiff, against Kaiser-Frazer Corporation, et al., defendants" now pending in the United States District Court for the Eastern District of Michigan, Southern Division, Civil Action No. 7365. The plaintiffs recognize and agree that Kaiser-Frazer shall prosecute or otherwise dispose of such claims as in the discretion of its Board of Directors is deemed advisable.

4. Nothing contained in this agreement shall in anywise discharge or release Graham-Paige Motors Corporation from or in respect of the claim or claims asserted against said Graham-Paige Motors Corporation in an action entitled "Michael Stella against Graham-Paige Motors Corporation and Kaiser-Frazer Corporation" pending in the United States District

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Court for the Southern District of New York, Civil Action No. 51-92 and in the action entitled "Michael Stella, plaintiff, against Graham-Paige Motors Corporation and Kaiser-Frazer Corporation, defendants" pending in the United States District Court for the Eastern District of Michigan, Civil Action No. 8344.

5. In entering into this agreement, the individual defendants and the corporate defendants do not admit or concede the truth of or liability for any of the allegations, matters or things set forth or referred to in the amended complaint and the notice to amend and supplement the amended complaint in the stockholders derivative action or any of the matters and things referred to herein. In the event that this agreement and the compromise and settlement herein agreed to shall not be approved pursuant to Rule 23(c) of the Rules of Civil Procedure as more fully provided in paragraph 7 hereof, this agreement shall not be offered in evidence or otherwise used by or against any of the parties hereto for any purpose whatever.

6. As soon after the execution of this agreement as is feasible, the plaintiffs and Kaiser-Frazer will make an appropriate application to the District Court of the United States for the Eastern District of Michigan, Southern Division, for an order pursuant to Rule 23(c) of the Rules of Civil Procedure approving this agreement and providing for the dismissal and compromise of the derivative stockholders action in accordance with its terms.

7. This agreement is subject to the approval of the District Court of the United States for the Eastern District of Michigan, Southern Division, pursuant to the provisions of said Rule 23(c). If for any reason

the court should fail to make an order approving this agreement and dismissing and compromising the stockholders derivative action in accordance with its terms, this agreement and all of the terms and conditions hereof shall be null and void and of no force and effect whatsoever and none of the parties hereto shall be bound or prejudiced thereby.

8. The parties agree that they shall execute any further agreements and writings and perform any and all acts necessary or proper to carry out the purpose and intentions of this agreement.

9. This agreement may be executed in any number of counterparts, any one of which when executed by any of the parties hereto shall be deemed an original for all purposes. If any of the individual defendants or corporate defendants should fail to enter into this agreement, it shall nevertheless be effective as to all of the parties signatory hereto; and, in such event, any such individual defendant or corporate defendant shall be entitled to the benefits of paragraph 2 hereof.

IN WITNESS WHEREOF, the individual parties have hereunto set their hands and seals and the corporate defendants and Kaiser-Frazer Corporation have caused these presents to be executed by their duly authorized officers as of the day and year first above written.

JEROME R. PERGAMENT (L. S.)
Jerome R. Pergament

GEORGE J. LONDON (L. S.)
George J. London

On their own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated

Exhibit 1. Annexed to Affidavit of Mark F. Hughes.

JOSEPH W. FRAZER (L. S.)
Joseph W. Frazer

HENRY J. KAISER (L. S.)
Henry J. Kaiser

EDGAR F. KAISER (L. S.)
Edgar F. Kaiser

CLAY P. BEDFORD (L. S.)
Clay P. Bedford

W. A. MACDONALD (L. S.)
W. A. MacDonald

HICKMAN PRICE, JR. (L. S.)
Hickman Price, Jr.

THE PERMANENTE METALS CORPORATION
By E. E. TREFETHEN, JR.
Vice-President

PERMANENTE PRODUCTS COMPANY
By E. E. TREFETHEN, JR.
Vice-President

KAISER-FRAZER CORPORATION
By J. F. REIS
Vice-President

Exhibit 1, Annexed to Affidavit of Mark F. Hughes.

AMENDED COMPLAINT.

(Cert. tr., p. 61.)

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE EASTERN DISTRICT OF MICHIGAN,

SOUTHERN DIVISION.

Civil No. 7354.

JEROME R. PERGAMENT and GEORGE J. LONDON, suing on their own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated and in the right of and on behalf of Kaiser-Frazer Corporation,

Plaintiffs,

—against—

JOSEPH W. FRAZER, HENRY J. KAISER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., GRAHAM-PAIGE MOTORS CORPORATION, OTIS & CO., CYRUS EATON, THE PERMANENTE METALS CORPORATION, PERMANENTE PRODUCTS COMPANY, UNITED STATES OF AMERICA, RECONSTRUCTION FINANCE CORPORATION and KAISER-FRAZER CORPORATION,

Defendants.

Plaintiffs suing on their own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated and in the right of and on behalf of Kaiser-Frazer Corporation, by their attorneys, Samuel L. Chess and Fischer & Fischer, and Perlman, Goodman, Hecht &

Exhibit 1, Annexed to Affidavit of Mark F. Hughes.

Chesler, for their amended complaint herein respectfully show and allege upon information and belief, except as to paragraph "1", which is alleged on personal knowledge:

(Cert. tr., pp. 64-69.)

For a Second Cause of Action against defendants Joseph W. Frazer, Henry J. Kaiser, G. G. Sherwood, E. E. Trefethen, Jr., Clay P. Bedford, W. A. MacDonald, O. B. Motter, Hickman Price, Jr., Otis & Co., Cyrus Eaton and Kaiser-Frazer Corporation:

15. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs "1" and "2" hereinabove as though herein set forth at length.

16. Plaintiffs repeat and reallege each and every allegation set forth in paragraph "4" hereinabove as though herein set forth at length and further allege that defendant Cyrus Eaton resides in the City of Northfield, State of Ohio.

17. Defendant Otis & Co. is and at all the times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and at such times had and still has offices for the transaction of business in the County, City and State of New York and in the City of Detroit, Michigan. Defendant Cyrus Eaton is and at all times hereinafter mentioned was a director, officer and one of the principal stockholders of said defendant Otis & Co.

18. Prior to February 3, 1948 defendant Kaiser-Frazer contemplated a public issue of 1,500,000 shares of the common stock of said Kaiser-Frazer at a price to the public of $13 per share, and in that connection arrangements had been made with defendant Otis & Co. and with

Exhibit 1, Annexed to Affidavit of Mark F. Hughes.

First California Company and Allen & Company as underwriters under which said underwriters were to acquire such shares under a firm commitment at a price to yield to defendant Kaiser-Frazer $11.50 per share and to yield to said underwriters, when and if they disposed of said stock, underwriting discounts and commissions in the amount of $1.50 per share. It was contemplated by the parties that the stock would be offered to the public on February 4, 1948 and that the underwriting agreement would be signed prior thereto.

19. On or prior to February 2, 1948 defendants Otis & Co. and Cyrus Eaton advised the officers and directors of Kaiser-Frazer that the proposed underwriting agreement would be executed by the underwriters if and only if defendant Kaiser-Frazer undertook during the day of February 3, 1948 to "stabilize" the market in the stock of Kaiser-Frazer at $13.50 per share, and advised the officers and directors of Kaiser-Frazer that such "stabilization" operations would involve the acquisition by Kaiser-Frazer of no more than 25,000 shares of its stock on the market. Said defendants, moreover, undertook to conduct said stabilization operations on behalf of defendant Kaiser-Frazer. Arrangements were made, accordingly, that such "stabilization" operations be conducted on February 3 through the acquisition by defendant Kaiser-Frazer of its own stock on the market so as to maintain a market price of $13.50 per share, and that such operations be conducted by defendants Eaton and Otis & Co. on behalf of defendant Kaiser-Frazer.

20. During the course of the following day, namely, February 3, 1948, said "stabilization" operations were conducted as per the aforesaid arrangements, but it soon became apparent that such operations would necessitate the acquisition by defendant Kaiser-Frazer of increasingly larger numbers of its own shares on the market and,

accordingly, defendants Eaton and Otis & Co. advised the acquisition of increasingly large numbers of shares and obtained the authorization from the officers and directors of Kaiser-Frazer to acquire such shares on behalf of defendant Kaiser-Frazer. By the end of said day, namely, February 3, 1948, there had been acquired in pursuance of said "stabilization" operations by and on behalf of defendant Kaiser-Frazer a total of 186,200 shares of the stock of defendant Kaiser-Frazer at a cost to defendant Kaiser-Frazer in the neighborhood of $2,500,000.

21. Said "stabilization" operations were in truth and in fact conducted for the purpose of inducing the purchase by the public of the stock proposed to be offered by defendant Kaiser-Frazer, were for the purpose and had the effect of creating an artificial market in the stock of said defendant Kaiser-Frazer, and were conducted in such manner and by such means as to peg or rig the price of said stock on the national securities exchanges, the facilities of which were used by the public for the sale and acquisition of said stock and were conducted in such manner as to violate various provisions of Sections 9, 10 and 17 of the Securities Exchange Act of 1934 and the rules promulgated in pursuance thereof. Moreover, defendants in causing defendant Kaiser-Frazer to make such substantial acquisitions of its own stock on the market for the purposes and with the effect aforesaid, knew or should have known that their conduct was improper and unlawful and that they were jeopardizing the interests of defendant Kaiser-Frazer, particularly inasmuch as the stock thus acquired was worth substantially less than the price paid therefor.

22. On said date, namely, February 3, 1948, defendants Eaton and Otis & Co., anticipating difficulty in the dispo-

sition of the 1,500,000 shares of stock which it had been arranged that the underwriters were to acquire from defendant Kaiser-Frazer for sale to the public; and believing that their conduct as herein set forth might facilitate the disposition of such stock, wrongfully and fraudulently notified many persons, firms and corporations of the aforesaid "stabilization" operations being conducted on behalf of defendant Kaiser-Frazer, and advised and counseled them then and there and on that day to dispose of such stock of Kaiser-Frazer as they had on the market which was being pegged at $13.50 per share, and advised and counseled them that on the following day, when the underwriters offered the stock to the public, they would be able to acquire such stock at $13.00 per share and thereby make a profit for themselves. Such wrongful, fraudulent and clandestine advice and counsel to such persons, firms and corporations accounted for the great activity in the market of the stock of defendant Kaiser-Frazer, and accounted for the necessity on the part of Kaiser-Frazer to acquire such large block of stock, as aforesaid, in its "stabilization" operations.

23. Thereafter, on February 3, 1948, and after the close of the market, defendants Eaton and Otis & Co. advised the officers and directors of defendant Kaiser-Frazer that the underwriters were unwilling to sign the agreement calling for their acquisition of 1,500,000 shares of the stock of Kaiser-Frazer and, accordingly, arrangements were then made to modify said agreement so as to require said underwriters to acquire 900,000 shares of stock under a firm commitment giving them the option to acquire the additional 600,000 shares of stock under what was described as a "best efforts" deal, *i. e.*, that they were to use their best efforts to dispose of the additional 600,000 shares of stock, but if they were unable to do so they would not be required to acquire same. Said agreement as so modified

was thereupon and on said day, namely, February 3, 1948, signed by the Underwriters and by defendant Kaiser-Frazer. In truth and in fact the said underwriters, including the defendant Otis & Co., were at that time, and by reason of the circumstances hereinabove related, estopped both in fact and in law from refusing to sign the original agreement calling for their acquisition of 1,500,000 shares of the common stock of defendant Kaiser-Frazer, and in making the aforesaid compromise arrangement the officers and directors of defendant Kaiser-Frazer acted negligently and in disregard of the best interests of defendant Kaiser-Frazer but under duress practiced upon them by defendants Eaton and Otis & Co.

24. On the following day, namely, February 4, 1948, and on the days following that date, the underwriters, particularly Otis & Co., found it impossible to dispose of the shares which they had agreed to acquire from defendant Kaiser-Frazer, and said defendant Otis & Co. importuned the officers and directors of defendant Kaiser-Frazer to relieve the underwriters of their commitments, but the directors and officers of Kaiser-Frazer were unwilling to do so. The underwriting agreement, which provided for the closing on February 9, 1948, provided also in substance that on or prior to the closing an opinion should be received from counsel for Kaiser-Frazer in form and substance satisfactory to counsel for Otis & Co., to the effect that except as set forth in the prospectus filed with the Securities and Exchange Commission covering the shares to be sold by the underwriters, there was not to the knowledge of counsel any material pending legal proceedings required to be set forth in the prospectus to which Kaiser-Frazer was a party, and that no such proceedings were contemplated. In an effort to relieve itself of its underwriting commitment said defendant Otis

& Co., wrongfully and fraudulently caused to be instituted in the Circuit Court for the County of Wayne, State of Michigan, in Chancery, an action entitled "James F. Masterson, Plaintiff, vs. Kaiser-Frazer Corporation, et al., Defendants", the complaint in said action being filed on the morning of February 9, 1948. Defendant Otis & Co., using the filing of said complaint as a pretext, refused to consummate the underwriting agreement and induced one of its co-underwriters, namely, First California Company, similarly to refuse to consummate said underwriting agreement.

25. At the times hereinabove mentioned the following defendants were directors and officers of defendant Kaiser-Frazer: Joseph W. Frazer, Henry J. Kaiser, Edgar F. Kaiser, G. G. Sherwood, E. E. Trefethen, Jr., Clay P. Bedford, W. A. MacDonald, C. B. Motter, and Hickman Price, Jr. Said defendants and one Walston S. Brown were the officers and directors acting for and on behalf of defendant Kaiser-Frazer in the aforesaid transactions.

26. In the aforesaid transactions the directors and officers of defendant Kaiser-Frazer, all of whom except for Walston S. Brown are defendants herein, acted negligently, wrongfully and unlawfully in that they caused Kaiser-Frazer to embark upon the so-called "stabilization" operations which were in fact in violation of the Securities Exchange Act of 1934, and in causing said defendant Kaiser-Frazer to acquire its own stock not only at a price far in excess of the value thereof, but at a time when it could ill afford the loss of the use in its business operations of the $2,500,000 which said acquisition entailed; in that they undertook such "stabilization" operations in advance of a written agreement with the underwriters committing them to the purchase from

defendant Kaiser-Frazer of 1,500,000 shares of stock upon the terms as arranged; and in that they permitted themselves to be induced to modify said underwriting arrangement after the conduct of said so-called "stabilization" operations, as aforesaid. In the aforesaid transactions the defendants Eaton and Otis & Co. acted wrongfully, unlawfully and fraudulently in that they induced defendant Kaiser-Frazer to conduct the aforesaid unlawful so-called "stabilization" operations, and actually conducted said operations on behalf of said defendant Kaiser-Frazer; in that while said so-called "stabilization" operations were being conducted they advised and counseled various persons, firms and corporations to dispose of their holdings of stock of Kaiser-Frazer, as aforesaid; in that after said so-called "stabilization" operations had been conducted they wrongfully failed and refused to sign the agreement calling for a commitment on the part of the underwriters to acquire the 1,500,000 shares of stock of defendant Kaiser-Frazer, as aforesaid, and by duress practiced on the officers and directors of defendant Kaiser-Frazer Corporation induced the aforesaid modification of said agreement; and in that they wrongfully inspired and caused to be commenced the aforesaid Masterson action and used same as a pretext for failing to abide by the modified underwriting agreement, and also caused one of its co-underwriters, namely, First California Company, to similarly refuse to abide by said modified underwriting agreement. The aforesaid conduct by all of the said defendants has resulted in serious damage to defendant Kaiser-Frazer Corporation, both direct and consequential, in an amount unknown to these plaintiffs, but believed to be in excess of $15,000,000. Such damages embrace, amongst other things, the losses to defendant Kaiser-Frazer Corporation resulting from its expenditure of $2,500,000 in acquiring its own stock at a price in excess

of the value thereof and resulting in its inability to use said funds in the normal operations of its business at a time when such funds were necessary to such operations; the loss of profits by defendant Kaiser-Frazer entailed by the deterioration of its good will resulting from the aforesaid machinations of the defendants; the losses to defendant Kaiser-Frazer entailed by the refusal of defendants Eaton and Otis & Co. to abide by the original underwriting arrangements, pursuant to which the underwriters were to acquire from defendant Kaiser-Frazer and pay for 1,500,000 shares of the stock of Kaiser-Frazer; and the failure and refusal, upon the pretext of the Masterson suit, to comply even with the modified underwriting agreement.

27. Defendant Kaiser-Frazer has as a plaintiff instituted an action against Otis & Co. in the Supreme Court of the State of New York, which action has been removed to the United States District Court for the Southern District of New York, in which it seeks to require Otis & Co. to abide by the modified underwriting agreement and in which it seeks also damages from said defendant Otis & Co. for inducing First California Company to repudiate its obligations under the modified underwriting agreement. The said action, which is extremely limited in scope, does not seek the relief sought on behalf of defendant Kaiser-Frazer by the plaintiffs herein for the reason that the officers and directors of defendant Kaiser-Frazer, defendants herein, are involved and are implicated in the wrongful conduct hereinabove alleged resulting in damage to defendant Kaiser-Frazer far in excess of that sought by the complaint in the aforesaid action and for which, as aforesaid, said officers and directors of defendant Kaiser-Frazer are liable along with defendants Eaton and Otis & Co.

Exhibit 1, Annexed to Affidavit of Mark F. Hawkes

28. Plaintiffs have made no demand upon defendant Kaiser-Frazer or upon its officers or directors to institute action on behalf of Kaiser-Frazer for the relief sought herein, because the said officers and directors of Kaiser-Frazer are involved and implicated in and are responsible for the aforesaid transactions and are liable therefor to defendant Kaiser-Frazer: In connection with the aforesaid transactions they acted negligently, wrongfully and unlawfully to the damage of defendant Kaiser-Frazer Corporation, as aforesaid; they (except for Walston S. Brown) are defendants herein; and any such demand, as aforesaid, would in the circumstances be useless and futile.

29. This action is not a collusive one conferring upon a court of the United States jurisdiction of an action of which it would not otherwise have jurisdiction.

30. Exclusive of interest and costs the matter in controversy in this action excees the sum of $3,000.

31. Plaintiffs have no adequate remedy at law.

* * * *

(Cert. tr., pp. 74-75.)

WHEREFORE, plaintiffs respectfully pray for judgment as follows:

(a) That defendants and each of them other than defendant Kaiser-Frazer Corporation account for their acts and conduct as directors and officers of said defendant Kaiser-Frazer Corporation and as conspirators in respect of and participants in said acts and conduct, and that they be directed to account for all moneys, assets, facilities and property of said defendant Kaiser-Frazer Corporation which were negligently, wrongfully, unlawfully and fraudulently wasted, diverted, misapplied, mis-

appropriated and lost, and that they be directed to pay over and to restore to said defendant Kaiser-Frazer Corporation any and all sums of money thus accounted for;

(b) That is be decreed and adjudged that defendant, The Permanente Metals Corporation holds the aforesaid lease on the Trentwood plant in trust for defendant, Kaiser-Frazer Corporation, and that said The Permanente Metals Corporation be directed to assign, transfer and set over said lease to and for the benefit of defendant, Kaiser-Frazer Corporation; and that defendant, The Permanente Metals Corporation, and defendant, Permanente Products Corporation, account for and pay over to defendant, Kaiser-Frazer Corporation, all profits made by them by and through the operation of the Trentwood plant, and the sale of products manufactured thereat;

(c) That defendants and each of them other than defendant Kaiser-Frazer Corporation be directed to account for all secret gains, profits, advantages and benefits received by them, or any of them, directly or indirectly, through the wrongful, improper and illegal use of the moneys, assets, facilities and property of defendant Kaiser-Frazer Corporation and that they be directed to repay, restore and pay over all such moneys and properties so acquired or the value thereof;

(d) That defendants and each of them, other than defendant Kaiser-Frazer Corporation, account to said defendant Kaiser-Frazer Corporation, for their acts and conduct herein complained of, and that they be directed to pay over and restore to said defendant Kaiser-Frazer Corporation all losses occasioned by their acts and conduct, and all profits or gains realized by them by said acts and conduct;

(e) That plaintiffs be given such other and further

relief as may be just and proper in the premises, together with the costs and disbursements of this action.

SAMUEL L. CHESS,
17 John Street,
New York 7, N. Y.

FISCHER & FISCHER,
2320 Guardian Building,
Detroit 26, Michigan.

PERLMAN, GOODMAN, HECHT & CHESLER,
10 South LaSalle Street,
Chicago, Illinois.

Attorneys for Plaintiffs.

State of New York,
County of New York—ss.:

JEROME R. PERGAMENT, being duly sworn, deposes and says: That he is one of the above named plaintiffs herein; that he has read and knows the contents of the foregoing amended complaint; that the same is true of his own knowledge except as to matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

JEROME R. PERGAMENT.
Jerome R. Pergament.

Sworn to before me, this
22nd day of July, 1948.

MARTIN M. CHESS
Martin M. Chess
Commissioner of Deeds N. Y. City
N. Y. Co. Clk's No. 8 Reg. No. 0-C-43
Bronx Co. Clk's No. 2 Reg. No. 0-C-17
Kings Co. Clk's No. 26 Reg. No. 50-C-31
Commission Expires Jan. 27, 1950

Exhibit 1, Annexed to Affidavit of Mark F. Hughes.

State of New Jersey,
County of Hudson—ss.:

GEORGE J. LONDON, being duly sworn, deposes and says: That he is one of the above named plaintiffs herein; that he has read and knows the contents of the foregoing amended complaint; that the same is true of his own knowledge except as to matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

GEORGE J. LONDON.
George J. London.

Sworn to before me, this
22nd July, 1948.

EDWARD J. SCANLON
Notary Public of New Jersey
My Commission Expires Aug. 30, 1949.

(NOTARIAL SEAL)

Exhibit 1. Annexed to Affidavit of Mark F. Hughes.

NOTICE.

(Cert. tr., pp. 78-83.)

DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION.
Civil Action File No. 7354.

JEROME R. PERGAMENT, et al.,
Plaintiffs,

v.

JOSEPH W. FRAZER, et al.,
Defendants.

To:

BUTZEL, EAMAN, LONG, GUST & KENNEDY, Esqs.,
1881 National Bank Building,
Detroit 26, Michigan,
Attorneys for Kaiser-Frazer Corporation,
and certain individual defendants.

BODMAN, LONGLEY, BOGLE, MIDDLETON &
ARMSTRONG, Esqs.,
1400 Buhl Building,
Detroit 26, Michigan,
Attorneys for Graham-Paige Motors Corporation.

GEORGE E. BRAND, Esq.,
3709-3723 Barlum Tower,
Detroit 26, Michigan,
Attorney for The Permanente Metals Corporation
and Permanente Products Company.

Exhibit 1, Annexed to Affidavit of Mark F. Hughes.

DYKEMA, JONES & WHEAT, Esqs.,
2746 Penobscot Building,
Detroit 26, Michigan,
Attorneys for Otis & Co.

Gentlemen:

PLEASE TAKE NOTICE that upon the trial of the above entitled action, the undersigned, on behalf of the above named plaintiffs, will move to amend and supplement the amended complaint herein so that same shall include the following allegations and prayers for relief:

I.

Following Paragraph 40 of the said amended complaint:

40a. Thereafter and in or about the month of October, 1949, said defendant, Permanente Metals, then being in possession of the Trentwood Rolling Mill under said lease, acquired title to said plant from the lessor thereof or some other agency of the United States, and, at or about the same time, the said defendant, then being in possession of the Mead and Baton Rouge plants, under leases, also obtained title to said plants, all as more fully described hereinafter, the purchase price being paid by payment of a small percentage of the total thereof and by agreement to pay the balance in installments partly in cash and partly through the delivery to the government of aluminum ingots.

40b. Under the letter agreement referred to in Paragraph 38 of the amended complaint, which was dated March 27, 1946, the War Assets Administration also agreed to lease, not to Kaiser-Frazer, but to, Kaiser Cargo, Inc., a company in which Henry J. Kaiser and his associates were and still are officers and directors and

Exhibit 1, Annexed to Affidavit of Mark F. Hughes.

principal or sole stockholders (and the name of which was subsequently changed in 1946 to Kaiser Fleetwings Inc., and again later changed to Kaiser Metal Products Corporation), the so-called Spokane, Washington reduction plant, at Mead, Washington, near Spokane, which plant is herein referred to as the Mead plant. Furthermore, on August 16, 1946, Kaiser Cargo, Inc., obtained from War Assets Administration, a letter agreement wherein and whereby the latter agreed to lease to Kaiser Cargo, Inc., a plant at Baton Rouge, Louisiana, herein referred to as the Baton Rouge plant, with facilities for the production of alumina from bauxite ore. Kaiser Cargo, Inc., assigned these agreements to Permanente Metals, which, pursuant thereto, obtained leases on said plants (on the Mead plant on July 19, 1946, and on the Baton Rouge plant on November 1, 1946); and thereafter and in or about October, 1949, said defendant, Permanente Metals, acquired title to said plants, along with the Trentwood plant, as alleged in Paragraph 40a hereof.

40c. The said three (3) plants, namely, the Trentwood plant, the Mead plant and the Baton Rouge plant, had been built by the United States Government in 1942 and 1943, built by the United States Government in 1942 and use and operation. The Baton Rouge plant, as aforesaid, had facilities for the production of, and did produce, alumina from bauxite ore. The Mead plant was designed to and did produce primary aluminum in pig form from alumina produced at the Baton Rouge plant. At the Trentwood plant, the aluminum pig produced at the Mead plant was and is remelted and manufactured into finished or semi-finished aluminum products. In making the aforesaid agreements and leases, and ultimate sales of the said plants, it was the purpose of the government to foster a new and fully integrated enterprise which could become a completely independent operator, so that

competition in the aluminum industry could be effectually furthered, and said plants were all put in operating condition at the cost and expense of the government, and without expense to Permanente Metals.

40d. In or about the month of June, 1949, and to supplement the operations of Permanente Metals at the Trentwood, Mead and Baton Rouge plants, Permanente Metals acquired from the United States, through War Assets Administration, an aluminum rod and bar mill at Newark, Ohio.

40e. Not only was the letter of intent of March 27, 1946, with respect to the Trentwood plant made with Kaiser-Frazer, but to the knowledge of the defendants, the opportunities to obtain leases on the Mead and Baton Rouge plants, and ultimately to acquire said Trentwood, Mead and Baton Rouge plants, and the opportunity to acquire the aforesaid mill at Newark, Ohio, were opportunities which were offered to or were readily available to Kaiser-Frazer, and they were opportunities which in the light of the above facts and others, and particularly the existence of a large demand for aluminum products, and the possession of or availability to Kaiser-Frazer of the resources and facilities necessary to exploit said opportunities, and the assurance of substantial profits, should and could have been taken and exercised on behalf of Kaiser-Frazer, and would have been so taken and exercised, if the directors and officers of Kaiser-Frazer had properly exercised their fiduciary duties to Kaiser-Frazer. In causing said Kaiser-Frazer to relinquish or be deprived of said opportunities and in enabling them to be taken and exercised on behalf of Kaiser Cargo, Inc. (now known as Kaiser Metal Products Corporation), and Permanente Metals, the directors and officers of Kaiser-Frazer acted with gross negligence, with reckless indif-

ference to the rights and interests of Kaiser-Frazer, and in violation of their duties to Kaiser-Frazer, and in wrongful and fraudulent conspiracy with Kaiser Cargo, Inc. (now known as Kaiser Metals Products Corporation), and Permanente Metals, and the officers and directors thereof, and for the purpose and with the effect of benefiting, enriching and advantaging Permanente Metals, the various Kaiser companies which had the majority stock interests in Permanente Metals, the aforesaid common directors of Kaiser-Frazer and Permanente Metals and other business associates of the Kaisers. The aforesaid profits made by Permanente Metals, referred to in Paragraph 39 of the amended complaint, and the profits thereafter made, were enabled to be made in part through the operations of the Mead and Baton Rouge plants and the mill at Newark, Ohio, as well as the operations of the Trentwood plant.

The following paragraph is to be substituted for Paragraph 41 contained in said amended complaint:

41. By reason of the premises, Kaiser-Frazer is entitled to a decree of this Honorable Court declaring: That Permanente Metals holds the said Trentwood, Mead and Baton Rouge plants and the Newark, Ohio, mill in trust for Kaiser-Frazer; that title to said plants and mill be assigned, transferred and set over to and for the benefit of Kaiser-Frazer, upon the assumption by Kaiser-Frazer of the obligations incurred under any purchase agreements by Permanente Metals; that Permanente Metals and Permanente Products account for and pay over to Kaiser-Frazer all profits made by and through the operations of said plants and mill, and the sale of products manufactured thereat, undiluted by any sums which may be found to have been wrongfully paid over to the various "Kaiser Companies", as aforesaid; and that all defendants shall

ilarly account to Kaiser-Frazer for all such profits and for any and all damages sustained by Kaiser-Frazer as a result of the wrongful transactions herein alleged.

Permanente Products is named as a defendant herein for the reason that, as aforesaid, it is a wholly owned subsidiary of Permanente Metals, is the agency and instrumentality used by Permanente Metals to effectuate the substantial part of the sales made by it, has in its corporate treasury at least some of the profits made from such sales, and the accounting for profits and damages herein requested will be facilitated thereby.

II.

To add a Fourth Cause of Action to said amended complaint, which said cause of action shall read as follows:

For a Fourth Cause of Action against Defendants, Joseph W. Frazer, Henry J. Kaiser, Edgar F. Kaiser, G. G. Sherwood, E. E. Trefethen, Jr., Clay P. Bedford, W. A. MacDonald, O. R. Motter, Hickman Price, Jr., and Kaiser-Frazer Corporation:

46. Plaintiffs repeat and reallege each and every allegation set forth in Paragraphs 1 (as heretofore amended by "Amendments to Amended Complaint", filed and served January 12, 1949), 2 and 4 of the amended complaint as though herein set forth at length.

47(a) The directors and officers of Kaiser-Frazer have caused Kaiser-Frazer to make various arrangements with Kaiser Fleetwings Inc., a company owned and controlled by Henry J. Kaiser and his business associates, as aforesaid (the name of which was theretofore Kaiser Cargo, Inc., and which has since been changed to Kaiser Metal Products Corporation), under which said Kaiser Fleetwings Inc. performed for Kaiser-Frazer various aspects

of the work necessary in the manufacture of automobiles and the parts thereof, including doors and deck lids, and under which said Kaiser Fleetwings Inc. sold to Kaiser-Frazer doors and deck lids for use in automobiles manufactured by Kaiser-Frazer. In connection with said agreements, and pursuant thereto, the directors and officers of Kaiser-Frazer caused Kaiser-Frazer to acquire and furnish to Kaiser Fleetwings Inc. machinery and other equipment aggregating millions of dollars in cost and value for use by Kaiser Fleetwings Inc. in manufacturing said automobile parts for Kaiser-Frazer. In these transactions, Kaiser-Frazer was caused to pay excessive and exorbitant prices for the work done by Kaiser Fleetwings Inc. for Kaiser-Frazer, and the products sold to Kaiser-Frazer by Kaiser Fleetwings Inc., prices which were far in excess of the fair and reasonable value of said work, and the market or fair and reasonable value of said products, and in addition Kaiser-Frazer could and should have obtained said work and products from other sources without the substantial investment in machinery and equipment acquired and furnished for the use of Kaiser Fleetwings Inc., as aforesaid.

(b) In causing Kaiser-Frazer to make said arrangements with Kaiser Fleetwings Inc., the directors and officers of Kaiser-Frazer were acting in a manner detrimental to the interests of Kaiser-Frazer for the benefit, advantage and unjust enrichment of Kaiser Fleetwings Inc., and said directors and officers of Kaiser-Frazer acted wrongfully and fraudulently and in breach of their fiduciary duties to Kaiser-Frazer, and said acts and activities and the arrangements made, as aforesaid, resulted in damages to Kaiser-Frazer, and a waste of its funds and assets in an amount now not known to plaintiffs, but for which the individual defendants are accountable, and should be compelled to account to Kaiser-Frazer.

Exhibit 1, Annexed to Affidavit of Mark F. Hughes.

48. In or about the month of June, 1946, the directors and officers of Kaiser-Frazer caused Kaiser-Frazer to make an agreement with Graham-Paige Motors Corp., wherein and whereby the funds, moneys and credits of Kaiser-Frazer were used in whole or in part to finance a business venture on the part of Graham-Paige, at Long Beach, California, for the manufacture of farm equipment. Kaiser-Frazer had no interest in said venture, nor any expectancy therein, and said arrangement to finance said venture was wholly outside the legitimate scope of the activities of Kaiser-Frazer. The use of the moneys, funds and credits of Kaiser-Frazer in connection with said venture was intended to advantage Graham-Paige at the expense of and to the detriment of Kaiser-Frazer, and the acts of the directors and officers of Kaiser-Frazer in causing Kaiser-Frazer's moneys, funds and credit so to be used, were wrongful and fraudulent and in violation of their fiduciary duties to Kaiser-Frazer, and have resulted in damage to Kaiser-Frazer, and a waste of its funds and assets for which the individual defendants herein are accountable to and should be made to account to Kaiser-Frazer.

49. (a) Under date of April 1, 1946, the directors and officers of Kaiser-Frazer caused Kaiser-Frazer to lease from the United States Government certain buildings located at Long Beach, California (formerly part of an aircraft manufacturing plant owned by the government, and operated by Douglas Aircraft Company). Said lease was for a term of four years, and eleven months, with an option to renew for an additional five year term. The annual rent was $115,793 for the first year, $173,690 for the second year and $231,856 for each year thereafter. By letter of intent dated February 12, 1947, the War Assets Administration agreed to enter into an amendment under which certain additional property would be

included in the leased premises, the rental would be increased $63,836 per annum, and Kaiser-Frazer would be granted an option to purchase the property for $3,000,000. Said property was leased for the purpose of having it available as a west coast assembly plant for Kaiser-Frazer. The directors and officers of Kaiser-Frazer caused approximately $2,200,000 of the moneys of Kaiser-Frazer to be expended for the equipment of said plant. In the Fall of 1946, work on said plant was suspended and since that time, nothing further has been done or performed in connection therewith. However, the rent at the rates provided as above have continued to run and have continued to be paid by Kaiser-Frazer.

(b) In causing Kaiser-Frazer to make the aforesaid lease, the directors and officers of Kaiser-Frazer acted negligently, improvidently and recklessly and without sufficient or proper evaluation of the needs of Kaiser-Frazer and the ability of Kaiser-Frazer to properly equip said plant in order to enable it to function and to put it in effective operation. As a result of said transaction, Kaiser-Frazer has sustained damages running into millions of dollars for which the directors and officers of Kaiser-Frazer are accountable to and should be made to account to Kaiser-Frazer.

50. (a) In or about the months of May and June, 1946, and from time to time thereafter until the Fall of 1947, the directors and officers of Kaiser-Frazer caused Kaiser-Frazer to make large purchases of steel ingots from Kaiser Steel Co., Inc. (the name of which has since been changed to Kaiser Steel Corporation), a corporation owned and controlled by Henry J. Kaiser and his business associates, in quantities which were excessive and not needed in the busines

(b) In or about the Fall of 1947, and from time to time thereafter, the directors and officers of Kaiser-Frazer caused Kaiser-Frazer to make large purchases and continue to purchase from said Kaiser Steel Co., Inc., slab steel in quantities which were excessive and not needed in the business of Kaiser-Frazer.

(c) In the aforesaid transactions, Kaiser-Frazer was caused to pay excessive and exorbitant prices for the steel sold to Kaiser-Frazer by said Kaiser Steel Co., Inc., prices which were far in excess of the market or the fair and reasonable value thereof. In causing Kaiser-Frazer to engage in said transactions with said Kaiser Steel Co., Inc., the directors of Kaiser-Frazer acted wrongfully and fraudulently and in breach of their fiduciary duties to Kaiser-Frazer, and with the intent of benefiting and advantaging Kaiser Steel Co., Inc., at the expense of and to the detriment of Kaiser-Frazer. Said transactions have resulted in damage to Kaiser-Frazer in an amount now unknown to plaintiffs, but for which said individual defendants are accountable to and should be made to account to Kaiser-Frazer.

51. Plaintiffs repeat and reallege each and every allegation set forth in Paragraphs 28, 29, 30 and 31 of the amended complaint as though herein set forth at length.

III.

With respect to the prayers for relief substitute the following for Paragraph (b) of the prayer for judgment, as contained in the amended complaint:

(b) That it be decreed and adjudged that defendant, The Permanente Metals Corporation, hold the Trentwood, Mead and Baton Rouge plants, and the mill at Newark,

Exhibit 1, Annexed to Affidavit of Mark F. Hughes.

Ohio, in trust for defendant, Kaiser-Frazer Corporation, and that said The Permanente Metals Corporation be directed to assign, transfer and set over said plants and mill to and for the benefit of defendant, Kaiser-Frazer Corporation, upon the assumption by Kaiser-Frazer Corporation of the obligations incurred under any purchase agreements by The Permanente Metals Corporation; and that defendant, The Permanente Metals Corporation, and defendant, Permanente Products Corporation, account for and pay over to defendant, Kaiser-Frazer Corporation, all profits made by them by and through the operation of said plants and mill and the sale of products manufactured thereat; and that the defendants and each of them, other than defendant Kaiser-Frazer Corporation, be directed to account for all profits realized by them and all damages sustained by Kaiser-Frazer Corporation as the result of the wrongful and fraudulent diversion of the said plants and mill, and the opportunity to profit therefrom, from Kaiser-Frazer Corporation to The Permanente Metals Corporation.

Dated, October 22, 1949.

SAMUEL L. CHESS,
17 John Street,
New York 7, N. Y.

FISCHER & FISCHER,
2320 Guardian Building,
Detroit 26, Michigan.

PERLMAN, GOODMAN, HECHT & CHESLER,
10 South LaSalle Street,
Chicago 3, Illinois.

Attorneys for Plaintiffs.

Affidavit of Lewis M. Dabney, Jr., Read in Opposition to Motion.

(Cert. tr., pp. 109-138.)

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

MICHAEL STELLA, on behalf of himself and all other stockholders of Kaiser-Frazer Corporation,

Plaintiff,

—against—

HENRY J. KAISER, JOSEPH H. FRAZER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., WALSTON S. BROWN and KAISER-FRAZER CORPORATION,

Defendants.

State of New York,
County of New York—ss.:

LEWIS M. DABNEY, JR., being duly sworn, deposes and says:

I am one of the attorneys of record for the plaintiff herein and make this affidavit in opposition to defendants' motion for summary judgment filed herein.

The issue on this motion is whether plaintiff is precluded by certain prior proceedings in another jurisdiction (referred to hereinafter as "the Detroit proceedings") from trying the case upon the merits. The motion is based upon the approval of a settlement in the United States District Court at Detroit, pursuant to section 23 (c) F. R. C. P., of certain stockholder actions in behalf of

Kaiser-Frazer Corporation (Kaiser-Frazer) including one which was based on the transaction pleaded in the instant action. I participated in the Detroit proceedings and in the subsequent appeal therefrom.

The said Detroit proceedings are reported in *Pergament et al., etc.* v. *Frazer, et al.*, 203 F. 2d 315 (6 Cir. 1953); decision below in 93 F. Supp. 13. They resulted in an order approving the settlement agreement which is set out in Exhibit 1 annexed to the moving papers herein, which agreement purported, among other things, to give the release which is hereinafter discussed in detail.

As appears from the moving affidavit herein, the ground of motion is that approval of the settlement agreement in the Detroit proceedings has made its terms effective, "including the provision in paragraph 2 thereof releasing and discharging" various individuals and corporations from all further liability (moving affidavit of Hughes, p. 4). The position of the movants is, apparently, that the approval of the release in the Detroit proceedings has made its validity and effectiveness res judicata, and that the plaintiff herein is therefore barred and foreclosed from further prosecution of the case at bar. The position of the plaintiff herein is that, for the reasons hereinafter set forth, approval of the release did not have the effect claimed for it, and that the Detroit proceedings do not constitute a bar to the further prosecution of the instant action.

The issue of res judicata will constitute the basic issue upon the present motion. Such a plea, of course, brings before the Court two questions: (1) what was adjudicated in the prior proceeding, (2) whether the prior adjudication was of such character as to bar a subsequent proceeding. In this affidavit I shall set forth the facts, showing that in neither aspect did the Detroit proceedings result in barring the further prosecution of the present action.

Affidavit of Lewis M. Dabney, Jr.

PRELIMINARY STATEMENT

The action at Bar is a stockholders' derivative suit to recover on behalf of Kaiser-Frazer against its officers and directors, damages for waste of corporate funds in connection with an illegal market manipulation of the stock of Kaiser-Frazer. The complaint charges that in connection with a contemplated public offering of 1,500,000 additional shares of Kaiser-Frazer common stock on February 3, 1948, the individual defendants as officers and directors of Kaiser-Frazer caused it to stabilize the market in the stock at 13½ with the result that it bought 186,200 shares of stock at a cost in excess of $2,500,000. The complaint further charges that these transactions were violative of the anti-manipulative and anti-fraud sections of the Securities Exchange Act of 1934, and were either a deliberate or a negligent waste of the funds of Kaiser-Frazer by the individual defendants.

In *Stella* v. *Kaiser-Frazer*, 82 F. Supp. 301, Judge Leibell sustained the complaint herein as alleging a good cause of action, both under the Securities Exchange Act of 1934 and at common law; and he also overruled defendants' pleas to the venue, and motions to quash extraterritorial service, holding that the special venue and service provisions of that Act apply to this case.

The instant action was one of a group of stockholders' suits filed on behalf of Kaiser-Frazer which collectively presented eight claims against its officers and directors. These suits were:

(A) The Masterson suit filed on February 9, 1948 which covered all the claims, settlement of which was approved in Detroit, with the exception of the claim based on the so-called "Permanente" transaction.

(B) The instant suit which was filed on May 10, 1948.

(C) The Lefker suit which was filed in the Chancery Court in Delaware on June 30, 1948, involving the Permanente cause of action; and

(D) The Otis & Co. suit which was filed in the Federal Court in Delaware on July 2, 1948, also involving the Permanente cause of action.

In addition to the above suits there was filed, in Detroit, the Pergament action which was used as the vehicle for the settlement upon which the movants are relying in their present motion. This, too, was a stockholder's derivative suit. It was filed May 14, 1948, before the Lefker and Otis actions; however, the Pergament action did not originally include the Permanente claim, but brought it in by amendment filed September 13, 1948. Even as amended, however, the Pergament complaint, at the time when the settlement negotiations took place, omitted to plead claims set out in the other complaints and thereafter held to be meritorious.

In this state of affairs, the individual defendants, Henry Kaiser et al. (Kaiser being the dominant figure who then controlled and now controls Kaiser-Frazer) sought out, and negotiated a settlement with, counsel for Pergament. The attorneys for the individual defendants deliberately excluded from these negotiations counsel for plaintiff herein and counsel for the plaintiffs, Masterson, Lefker and Otis & Co.; and they exacted from Pergament's attorneys a pledge of secrecy respecting the negotiations. Three days before the settlement agreement was signed, counsel for the individual defendants persuaded Pergament's attorneys to file an amendment presenting claims not theretofore included in the Pergament complaint. The admitted purpose of these additions was to include these claims in the settlement for no additional consideration. The claim in the case at bar was also thrown in for no additional consideration, under the belief (later

testified to in Detroit) that it was "a very weak cause of action" (925)[1]. The District Court held that this claim was "absolutely without merit"; but the Court of Appeals, on appeal, declared the instance claim to be meritorious.

The negotiations leading to the settlement were marked by lack of arms length bargaining and deliberate concealment of material facts, such as to make the settlement constructively, if not actually, fraudulent. This is discussed at length by Allen, *J.*, in 203 F. 2d at pp. 319-324, as hereinafter set out. (It being immaterial, when fiduciaries' misconduct is in question, whether their fraud was "constructive" or "actual", I shall not try to distinguish between the two categories in my further discussion of the facts.)

As a result of such fraudulent tactics, a settlement was made of the claims asserted in the Pergament action, and, in addition, of those brought in by amendment three days before settlement. This may have been a permissible maneuver if performed by attorneys representing only the individual defendants. It becomes an impermissible breach of fiduciary duty, as pointed out by Judge Allen, when performed by lawyers *paid by*, and *purporting to represent Kaiser-Frazer, yet acting adversely to its interest.*

The settlement of the Pergament suit, so negotiated, was brought on in Detroit by a Notice to Show Cause addressed to all stockholders of Kaiser-Frazer. The settlement was approved by the District Judge, in a proceeding in which, as hereafter shown, he took the position that he was passing on a matter of business judgment rather than conducting a trial in the ordinary sense. Upon appeal such approval was affirmed as within the discretion of the District Judge. Judge Allen, dissenting, set forth undisputed circumstances in the negotiations which, she wrote,

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[1]This reference, and other references unless otherwise explained are to the pages of the printed record of the Detroit proceedings.

made the settlement constructively fraudulent and therefore ineligible for approval by the District Judge. The majority did not disagree as to fraud; they held that the approval of the District Judge was nevertheless within his discretion for the following reasons: The settlement, they said, could not become effective without the approval of the District Judge under Rule 23(e); he was, therefore, "a third party to the compromise" and no fraud was practiced *upon him;* accordingly he could, in his discretion, approve the compromise if he thought it in the interest of Kaiser-Frazer. *Masterson* v. *Pergament*, 203 F. 2d 315. The Supreme Court denied certiorari.

Accordingly the settlement has been finally approved. There is yet to be determined, however, the effect of such approval. This presents a question of first impression in the Federal courts under Rule 23(e).

Questions Here Presented

It is clear that there is here no defense of res judicata to the suit at bar on its merits. This is because nothing has been adjudicated on the merits. All that the District Judge has decided is that he considers a certain settlement in the interest of Kaiser-Frazer; all that the Court of Appeals for the Sixth Circuit has decided, by two to one majority, is that the District Judge did not abuse his discretion in so deciding.

Furthermore plaintiff herein is not precluded from trying his case on the merits by the second branch of the rule of res judicata (sometimes referred to as "collateral estoppel"), which is that even as to a different cause of action from that tried in the first court, an issue once litigated and determined between adversaries cannot be relitigated in the second court. *Cromwell* v. *Sac County*, 94 U. S. 351, 353.

In the Detroit proceedings evidence was taken as to two questions here pertinent; one, whether the instant action had probable merit, and two, whether the settlement was fraudulently procured. The District Judge decided that the instant action was "absolutely without merit;" but the Court of Appeals held the action to be meritorious. 203 F. 2d at p. 335. Hence, if the doctrine of collateral estoppel applies, the estoppel is in favor of the plaintiff herein. As regards fraud, the District Judge failed to make findings, because, as the record clearly shows, he considered the issue to be immaterial. On appeal, Judge Allen found that there was constructive fraud in the settlement; and the other two judges either agreed that fraud was present but held it immaterial, or they simply held the issue of fraud to be immaterial, so did not have to agree or disagree with Judge Allen. Under neither reading of the Court of Appeals' opinion was the issue of fraud determined against plaintiff.

If there is doubt or dispute as to what was decided in the Detroit proceeding, the rule is well settled, *first*, that this Court will look to the record to see what was there decided; *second*, that the burden is on the defendants to prove that the issue was in fact decided in their favor, as claimed by them, and any ambiguity will be resolved against them. The record facts in this regard are hereinafter set out.

However, it may be that this issue will never be reached, since it is of the essence of res judicata that the ruling relied upon must have been made by a judicial body acting in a judicial proceeding and making its determination in a judicial capacity. This, as I shall show, did not occur here. The District Judge ruled that the proceedings were not a trial. He held that his task was solely to determine what was in the best interests of the corporation. He was asked to decide, and did decide this matter in an

exercise of business judgment; and the Court of Appeals affirmed his action in so doing. This was an administrative, not a judicial, determination.

I turn now to the facts appearing in the record of the Detroit proceedings, which show the foregoing.

Fraud in the Settlement Negotiations

The pertinent facts on this issue are set out in the dissenting opinion of Judge Allen. 203 F. 2d at pp. 319-324. This opinion, as the majority stated, "was originally prepared by her for the Court but . . . must now be classified as a dissent" (p. 329). The majority did not disagree as to the facts set forth by Judge Allen, or with her conclusion that such facts constituted fraud; but they held that fraud in the negotiations was immaterial for the reasons mentioned *supra*, p. 5. Judge Allen wrote:

> "Early in 1949, then stockholders' derivative suits were pending against the directors of Kaiser-Frazer in three state courts and in three federal courts. The states included Michigan, California, New York and Delaware.
>
> In April, 1949, Kaiser-Frazer was in default upon bank loans of $16,000,000 guaranteed by the Kaiser interests, and faced the threat of liquidation. It secured an offer from the RFC in October, 1949, for a loan of $44,000,000. The granting of this loan was conditioned, among other things, upon the making of a guaranty of $15,000,000 of the loan by Kaiser and his associates and a pledge of $10,000,000 of collateral. Henry J. Kaiser stated that he or his companies would not guarantee the loans unless the stockholders' suits were settled, but, as a matter of fact, on November 9, 1949, the day the

order to show cause why the compromise should not be approved was filed, the loans were guaranteed by Kaiser and his associates in a contract which made no mention of the stockholders' suits.

About September 21, 1949, Mark F. Hughes, an attorney connected with the firm which was counsel for Kaiser-Frazer and the Kaisers individually, stated to Samuel L. Chess, attorney for Pergament and London, that there was a possibility of an offer of settlement. After asking for and receiving assurance that Chess had nothing whatever to do with Otis & Company, Hughes said that he might soon have a proposal. Hughes required, and Chess agreed, that Chess would disclose to no one, not even to his own partners or associates, that there was a possibility or any talk of settlement. Chess associated an attorney, Israel B. Perlman, with him, who said that he "couldn't evaluate or appraise the various causes of action," but agreed to help Chess in negotiations. Hughes dissuaded Chess from taking depositions, saying that he would give Chess any information that he would like to have. Later Hughes and his partner, Walston S. Brown, met with Chess. Brown explained some of the facts of the Graham-Paige transaction to Chess, and they also discussed the Fleetwings controversy and the matter of the lease of the Long Beach plant. Brown, in addition to being a member of the firm representing Kaiser-Frazer and being himself a defendant director of Kaiser-Frazer, was also attorney for Henry J. Kaiser, Edgar Kaiser, and Joseph Frazer. At the proceedings in the District Court he testified that in these negotiations with Chess and Perlman his effort was to get the easiest possible terms of settlement for the indi-

vidual defendants and Graham-Paige, and that [redacted] therefore avoided making disclosures or stating facts or furnishing information that would support a recovery for Kaiser-Frazer in these suits. This striking admission was made although Brown's firm was paid by Kaiser-Frazer for these negotiations.

Settlement of the Pergament and London suit was finally proposed. The consideration offered was (1) the guaranty by the Kaiser interests of the RFC loan; (2) the purchase by Kaiser Fleetwings (Kaiser Metal Products, Inc.) at their depreciated book value of certain presses which belonged to Kaiser-Frazer and were in the Fleetwings plant; and (3) $50,000. Chess and Perlman were pleased with the offer. They thought that if they got only the guaranty of the RFC loan it would be a "wonderful settlement." They decided to ask for $500,000, but agreed if need be they would accept the offer as given, rather than jeopardize the compromise. On October 25, 1949, the settlement was executed as proposed, except that it substituted the $500,000 demanded by Chess and Perlman for the $50,000 offered. Three days previous, October 22, 1949, Chess, securing from Hughes the necessary data, filed an amended petition which included the various other causes of action pending in other jurisdictions. The settlement contract contained broad general releases in favor of all the defendants including Graham-Paige, Frazer and Fleetwings, which contributed nothing. The directors of Kaiser-Frazer, all of whom were originally joined as individual defendants, approved the compromise. The proceedings were then brought before the District Court for hearing pursuant to notice under Rule 23(c), Federal Rules of Civil Procedure. So far as this record shows, no discussion was held in

the negotiations as to the value of the added causes of action and the figure of settlement remained the same as that negotiated for the causes of action originally pleaded."

. . . . . .

"The issue of concealment is material. Certain facts were, as Hughes admitted, suppressed during the period of negotiation. Thus it does not appear that Chess and Perlman were informed by Hughes or Brown of the details of the claim for over a million dollars held meritorious by the District Court for excessive prices paid to Fleetwings [a Kaiser controlled company] for doors. Perlman was not informed of the prior negotiations with reference to the purchase of the presses by Fleetwings. He learned of them for the first time in court. The issue of concealment is also material because the attorneys for Pergament and London were forced to conceal from all other attorneys and from their own associates the fact that there was any possibility of settlement."

. . . . . .

"The proceedings for settlement were not only instituted but admittedly directed by the attorneys for the defendants. Depositions were discouraged. Chess and Perlman were briefed by Brown and Hughes whose firm was paid by Kaiser-Frazer but admittedly acted adversely to it. In the negotiations Perlman, who had charge of the bargaining, refused to discuss the merits of the causes of action pleaded in the Pergament amended complaint. He frankly said he could not evaluate them. Brown said that he had no knowledge of his own about the Permanente transaction. Perlman's office associates were acquainted with the claims but Per-

man was forbidden to discuss them. The only question debated in the conference was the amount of cash settlement."

* * * *

"Pergament and London were under a duty fairly to represent the common rights of other stockholders. *Young* v. *Higbee Company*, *supra*, 212. They did not, under the undisputed facts, represent them at all as to Fleetwings or the Muntz Car Company case. Up to a few days before the actual settlement, the Fleetwings transactions were considered of no importance by Chess. They were not included in the amended petition of September 13, 1948, upon which the negotiations were founded and the amount of the settlement was in no way increased when they were included in the final amendment. The Muntz Car Company transaction, evidence as to which has been deleted from the record, was found by the court to have probable merit in the amount of $85,000, and was also completely ignored. These meritorious causes of action, under the admitted evidence, have no weight in the result achieved for Kaiser-Frazer.

The releases included in the proposed settlement emphasize the lack of effective representation by Chess and Perlman. The general releases covered three non-contributing defendants, Graham-Paige, Fleetwings, and Joseph Frazer. These were the defendants primarily liable if the District Court's conclusion that the Fleetwings door transaction, the Graham-Paige receipt of underwritten stock from Kaiser-Frazer, and the Muntz Car Company distributorship matter presented cases of merit. The order of the District Court limited the general release provisions of the settlement in certain ways but left them in force as to these causes

of action. These releases were of course desirable for the defendants but hardly beneficial to Kaiser-Frazer and other stockholders. Brown, as chief negotiator for the settlement on behalf of the defendants, director and secretary of Kaiser-Frazer, and admittedly acting in dual capacities, was released on motion of the plaintiffs prior to the hearing.

It is conceded that the settlement agreement was planned and negotiated by the attorneys for the defendants Henry J. Kaiser, Joseph Frazer, and individual directors, who, while nominally representing Kaiser-Frazer, admitted that they were acting adversely to its interests. These attorneys picked the suit that they would settle, with its friendly lawyers, and by amendment inserted in the suit causes already pending in three federal courts in other states and in three state courts. The adversary relationship essential to protection for Kaiser-Frazer was thus seriously impaired if not destroyed."

* * * * *

"But the question of notice and acquiesence in representation by Pergament and London is even more important. While the members of the class had constructive notice of the pendency of the amended complaint of September 13, 1948, they had no effective notice of the amendment of October 22, 1949, which appropriated all other causes of action. Three days intervened between this final amendment and the execution of the compromise. Appellees' witnesses frankly state that the compromise negotiations were carefully concealed because the appellee knew that other parties in similar suits would "make as much trouble for us as they possibly could." The inescapable infer-

ence is that appellee knew that their representation would not secure assent. Notice was given to all parties before hearing in the District Court upon the compromise but notice was carefully withheld from parties other than the negotiators until the compromise agreement was executed.

If manipulations such as these are upheld in the courts, the stockholders' derivative suit, which was developed to protect the corporation and its stockholders from breach of trust or fraud on the part of the directors, will cease to be a protective shield. The deliberate concealment and exclusion of other parties and appropriate of their causes of action run counter to the purpose of Rule 23(a) and constitute constructive fraud upon the stockholders of Kaiser-Frazer."

* * * *

"I think the settlement should be set aside because of unfairness in the negotiations."

The majority, in so many words, refused to be led into a discussion of these facts, on the ground that, in a settlement proceeding under Rule 23(c), the District Judge sits as "a third party to the compromise," and there being no fraud *upon him*, antecedent fraud practiced on the other parties in negotiating the settlement did not matter. Under law universally recognized, fraud in the factum of a settlement between fiduciary and cestui vitiates the settlement; and a determination to approve a settlement so obtained in disregard of the fraud, is an administrative decision on a point of business judgment and not a judicial determination.

The further facts, to which I now turn, show that the defendants brought on, and the District Judge conducted, the proceedings as administrative and not judicial proceedings.

Affidavit of Lewis M. Dabney, Jr.

THE DETROIT PROCEEDINGS

1. The Manner in Which the Defendants Brought on and Conducted the Detroit Proceedings Shows that They Did Not Consider Them to be Judicial Proceedings.

The Pergament complaint as amended on September 13, 1948 set forth three claims for relief, the second of which was based upon the transaction set forth in the complaint herein. Jurisdiction rested solely on diversity of citizenship. The individual defendants in the second cause of action were nine of the ten directors of Kaiser-Frazer who are individual defendants herein. The omitted defendant was Edgar Kaiser (Ex. 1 to moving affidavit, p. 19) who was named, however, as a defendant in the first and third causes of action. The original complaint named Walkton S. Brown as a defendant; however, when the amended complaint was filed on September 13, 1948, Brown, whose citizenship was alleged to be the same as that of the plaintiff, Pergament, was dropped. Hence, Brown and Edgar Kaiser were, so far as concerns the instant case, not parties to the suit which was chosen as the vehicle of settlement; and Brown *could not* be a party, as that would have destroyed diversity.

At the time of the petition for settlement Kaiser-Frazer had appeared and answered, and so had the following defendants: Edgar Kaiser, Bedford, MacDonald and Price. The appearance of Edgar Kaiser, of course, brought him into court only as to the two causes of action in which he was named as a party defendant, but not as to the cause of action pleaded in the case at bar. The remaining individual defendants, i. e., Henry Kaiser, Frazer, Sherwood, Trefethen, and Motter had not been served and had not appeared (Ex. 1 to moving affidavit, pp. 4, 5).

While the agreement for settlement was signed by certain individual defendants, viz., Henry Kaiser, Edgar

Kaiser, Frazer, Bedford, MacDonald and Price (id., at p. 13), none of these defendants joined in the petition for settlement, the petitioning parties being only the settling stockholders and Kaiser-Frazer (id., at p. 6). Although certain of these individual defendants were physically in court as witnesses, they never appeared in the District Court *as parties*. This was recognized in the final order, which does not recite the appearances of the individual defendants, and in the notice of entry of this order, which is signed only, as was the petition for settlement, by counsel for the settling stockholders and for Kaiser-Frazer (291, 290—these and future page references, unless otherwise explained, are to the printed record of the Detroit proceedings).

We will hereafter argue that the individual defendants who were never parties to, or appeared in the Pergament action or settlement proceedings in the District Court, *cannot claim the benefits of the doctrine of res judicata*. This is hornbook law. The point here made is different: The experienced counsel who conceived and conducted the settlement and the Detroit proceedings must have known that no binding judicial determination could be obtained in favor of their clients, Henry Kaiser and his associates, unless they put them in court. Kaiser, who was a citizen of California, could not be brought into court in Michigan in a suit based solely on diversity unless he agreed to come, and other defendants were also non-residents. However, if these defendants came in, they would be in for all purposes, and if the settlement were disapproved and the suit thereafter prosecuted, they might be subject to a judgment on the merits. Counsel thought they found an escape from this dilemma by contriving a tertium quid. They left Kaiser and the other non-resident defendants out of court, but procured releases for them nevertheless, obviously on the theory that since the proceeding was not judicial, these defendants did not have to be in court.

These defendants thus secured releases but left open for future determination the binding effect of the releases in other suits.

2. Defendants Repeatedly Urged the District Judge to Conduct the Inquiry in a Way Inconsistent with Judicial Standards but Consistent with Administrative Procedures; and the District Judge Adopted Their Views.

A.

The cross-examination which elicited the facts as to fraud, summarized in Judge Allen's opinion, supra, proceeded under great difficulties. The proponents of the settlement urged, and the Court held, that the sole issue before him was whether the settlement presented to him was in the interest of Kaiser-Frazer; that it did not matter how the settlement was arrived at, the important thing being that it was now before him; and, specifically, that whether or not the settlement was fraudulently negotiated was neither here nor there. Accordingly, throughout the questioning of Brown, Hughes and Chess the Court made it emphatically clear that he considered it immaterial what Chess and Perlman did not know and were not told. Objections to questioning along these lines were repeatedly sustained (3819, 3835, 3845-9, 3863, 3910, 3953, 3956 and 3963-5). The objection, when first made, was on the ground that "the question here is as to whether this settlement that the Court has to take the responsibility for is a good settlement or not" (3819); and the Court accepted this point of view. Indeed, the Court manifested increasing irritation at the continued pressing of such questions, saying, "What difference does it make" [what was not disclosed] (3835)? He was told that the object

was "to show that the only persons who were acting on behalf of the stockholders were persons who unhappily were without adequate information to enable them to negotiate adequately or effectively" (3846), whereupon, after some colloquy, the following occurred:

> "Mr. Rein: I just want to say this, we knew enough to bring it to your Honor so that everything could be aired.
>
> Mr. Bernays: We will see whether everything was aired after we get the proof in.
>
> The Court: *I am not going to let you go into that*" (3849).

When counsel continued to press his questions the Court said, "You have some objective in these questions? . . . You are not just going on a witch hunt of some kind?" (3853).

Thereafter Mr. Chess was questioned respecting his knowledge of facts obviously relevant to the instant action, i. e., facts relating to market manipulations in preparation for the Kaiser-Frazer stock offering. The following occurred (3955-6):

> "Q. (By Mr. Bernays): Were you familiar with the circumstance that statements were issued and circulated by and on behalf of Kaiser-Frazer, some true, but some stated to have been incorrectly reported, *the intent and effect of which was to raise the market price of Kaiser-Frazer stock* between January 26, 1948 and February 2, 1948, from 11¾, according to Exhibit 166, on the first of those dates, to 14 on the 28th, and the 29th, and to 13½ on February 2, those being the last sale prices?
>
> The Court: Now, I want you to read that last question in part. I just want you to read it, and then I would like to have you look me straight in

the face and tell me that you think that is a proper question.

Read the first part.

(The last question was thereupon repeated in part by the reporter.)

The Court: Is there a gentleman sitting at that bar, including yourself, who thinks that is a proper question?—No.

Mr. Bernays: If I were asking——

Mr. Schofield: We don't say no. I think it is a perfectly proper question.

The Court: All right. Ruled out. Denied.

Now, gentlemen, if that is the line of your questioning, I am going to try one more. You may proceed with some questioning, but if that is the kind of questions you got, you might as well stop right now.

Mr. Bernays: I am bound to say that that is the kind of questions I have.

The Court: If that is the kind of questions, gentlemen, you can't believe that those are proper questions. You just can't believe it.

Mr. Schofield: There are things we knew in our case, and we were ready to prove them.

* * * * *

The Court: *Please. No more time of this Court with such foolishness.*"

Convinced, as the Court was, that he had the power to approve the settlement notwithstanding fraud, his irritation was natural enough. However, it graphically illustrates what *his* premise was: that he was conducting an *administrative* proceeding in which the sole question presented was whether *he thought the settlement was a good one*; not a judicial proceeding in which, if he found

fraud in the negotiations, he would be precluded from approving the settlement.

Defendants successfully pressed this view upon the Court. Throughout the trial they urged upon him that fraud in the negotiations was irrelevant, that any kind of bargaining was good enough so long as it got the proposal before the Court, whose duty it was to "back stop" for the settling attorneys, and to approve the compromise, with such modifications as might be necessary in light of disclosures at the trial, if in his opinion it was in the interest of the company. This is illustrated by the following statement of Mr. Rein, of counsel to Pergament (3566):

> "All this information they are talking about; all the evidence that they are talking about was brought before your Honor, how? By our petition to approve the settlement, opening up——"

It is further illustrated by his statement when challenged as to the lack of information as to pertinent facts, during the negotiations, of his colleagues, Chess and Perlman (3849):

> "Mr. Rein: I just want to say this, we knew enough to bring it to your Honor so that everything could be aired.
>
> Mr. Bernays: We will see whether everything was aired after we get the proof in.
>
> The Court: I am not going to let you go into that."

The proponents' view that the proceeding was non-judicial, is reiterated in the opening argument in their brief to the District Court, following completion of the hearing (p. 2):

> "This is an equity *inquiry* in which the Court exercises its discretionary powers and no jurisdic-

tional problem being presented, *neither thin technicalities nor other legalistic calisthenics should be permitted to influence the sound business judgment of the Court.*" (Emphasis ours.)

The "thin technicalities" and "other legalistic calisthenics" referred to, was the issue as to fraud in the negotiations.

The Court, as shown by his opinion (93 F. Supp. 13), adopted and followed the proponents' views expressed above. Referring to the extended arguments of counsel that preceded the taking of proof, he said in his opinion (p. 19) that "This Court was interested only in the stockholders of Kaiser-Frazer and in our opinion these several lawsuits were a big detriment to future progress of this company. Technicalities were not to be permitted to erase or delay a fair settlement if one had been reached." The following observations will make clear what was intended by the foregoing:

(1) The Court's interest in the stockholders, with which, of course, we have no quarrel, was expressed by him during the arguments referred to in the following terms (1746): "I am trying to save this company, as I told you right from the start. *That is my duty. . . .*" (Emphasis ours.)

In other words, the Court consistently envisaged his function as that of the executive, interested only in the business merits of the proposal before him and wholly indifferent to how that proposal had come about. On this score the Court was under a sense of compelling urgency, as appears from the following (579):

> "The Court: . . . I think lawsuits like this do a tremendous harm to a corporation. I think time is of the essence, so far as the existence of the corporation is concerned, the possible existence. And

successfulness, whether the company is successful, will hang in abeyance for the time being.

Mr. Schofield: No.

The Court: Yes."

(2) Accordingly, "technicalities," such as fraud in the antecedent negotiations, would not be "permitted to erase or delay a fair settlement if one had been reached," the test being the objective one whether in the Court's opinion the settlement was a good one as a business matter. This ignores, of course, the prime practical reason (apart from considerations of public policy) for the rule that vitiates a settlement procured by a fiduciary through fraud, namely, that the cestui is entitled to a fair chance to work out the best possible settlement, whereas a settlement procured by the wrongdoing fiduciary through non-disclosures and fraud can never be expected to be as favorable to the cestui as one honestly arrived at by effective and informed arms length bargaining.

(3) This, I submit, is the rationale for the distinction which the Court drew (93 F. Supp. at p. 21) between his function in the case of an "executed" settlement and his function in the case of an "executory" settlement. In the first case the Court would be sitting in its *judicial* capacity and determining the issues before it on established legal and equitable principles; hence if there was fraud in the factum the settlement *must be disapproved because the law compels it.* In the case of the "executory" settlement, however, where the Court, in the language later used by the Court of Appeals, acts as a "third party to the compromise," the Court is not acting in his judicial capacity but in the *executive* or *administrative* capacity of business arbiter, deciding what is in the business interest of the company. This, too, is disclosed in the Court's opinion

in the statement (p. 20; emphasis ours): "The important point is that this court—while not admitting that there was any such concealment—*now has the facts*," following which (p. 21) occurs the distinction between "executed" and "executory" settlement to which we have adverted above. This position conforms perfectly with the numerous rulings and statements of the Court on the issue of fraud during the hearings as quoted earlier herein.

B.

The District Court Refused to Permit Plaintiffs to Examine Before Trial on the Theory that He Was Not Conducting a Trial.

The Court repeatedly denied to objecting stockholders, including this plaintiff, their right to examine before trial for the purpose of showing that the settlement had been improperly and unfairly negotiated.

Notice of the hearing on the settlement was issued November 9, 1949, setting December 6th as the date of the hearing. Through one of my associates I requested counsel for the settling stockholders and for Kaiser-Frazer to inform objecting stockholders respecting the negotiations which had led to the proposed settlement. This request was refused. Thereupon notices were issued, in the Detroit proceeding, to take the depositions of the attorneys who had negotiated the settlement, and subpoenas duces tecum were issued out of this Court requiring the appearance and production of records by said attorneys bearing on such negotiations on November 23, 1949 in New York City. Thereupon counsel for the settling stockholders and Kaiser-Frazer secured an ex parte order from the Detroit Court staying the taking of these depositions until December 6, 1949, which was the date

set by the Court for the commencement of hearing on the proposed settlement.

Since this stay effectually deprived objecting stockholders of their right to examine before trial, counsel on November 23rd moved to vacate the stay, or, in the alternative, to postpone the hearing date. In the motion papers they pointed out to the Court the obvious lack of arms length bargaining due to the conflicting positions in which Brown and Hughes found themselves, and stated that they desired to examine "as to the history of the negotiations leading up to the proposed settlement" (181, 182). By telephone they asked the Court to set a prompt hearing on their request to vacate the stay, but the Court refused to set such hearing, or to vacate the stay, and stated that all matters could be taken up at the hearing set for December 6th.

The first two weeks of the hearing were devoted to statements of position and argument by counsel, wherein the following occurred (471):

> "The Court: * * * What is the other motion?
>
> Mr. Dabney: The other motion is a motion filed with your Honor about three weeks ago to permit us to proceed with our examinations before trial. At the time we filed the motion, we were not at the trial. But we are now.
>
> The Court: The notices had gone out for trial all over the United States?
>
> Mr. Dabney: That is correct, and we say, and I want to be heard briefly, that under the Federal Rules of Civil Procedure the right to examine before trial, and that is what we are getting into in substance,—*the right to examine before trial is a right that is valuable of which a litigant should not be deprived.*
>
> The Court: *I do not think this is actually a trial within the meaning of that rule.* * * *"

Thereafter, on or about December 17, the Court adjourned the hearings until January 17, 1950. He ruled that he would permit the taking of depositions of all persons *who would not be present at the hearing* (611). Since the attorneys who negotiated the settlement would necessarily be present, objecting stockholders were again precluded by this ruling from examining them before trial respecting the settlement and the settlement negotiations. The following then occurred (612):

> "Mr. Dabney: All I want, your Honor—I am not talking about the motion, I am talking about the depositions—I can see no reason why we should not be allowed to take depositions in the meantime; it will not delay the Court, because the Court is not going to sit until the 17th. Why should we be deprived of examing anybody we can examine in the meantime?
>
> The Court: I am not going to be caught in that possible trap. If you do it, Mr. Lacks may want to do it, or all of you may want to do it. And you will say, 'You did it for him, and now you are going to do it for me.' I have made my ruling, gentlemen."

Of course, it would obviously be improper in a *judicial* proceeding to deprive plaintiffs of their right, seasonably asserted, to examine before trial on the ground that others later asserting the same right might also be entitled to examine before trial. Naturally the Court knew this, and the reason for his ruling was the one previously stated, *"I do not think this is actually a trial within the meaning of that rule."*

The Federal Rules of Civil Procedure, including those relating to examination before trial, apply to "all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81" (Rule 1,

F. R. C. P.). None of the specific exceptions in Rule 81 apply to proceedings under Rule 23(c). Accordingly, the Court must have thought that a proceeding under Rule 23(c) is not "a case of a civil nature", i. e., a *judicial* proceeding.

C.

The District Court Admitted in Evidence, and Permitted Himself to be Influenced by Considerations Inappropriate in a Judicial Proceeding. Thus Further Evidencing His View That the Proceeding Was Not Judicial.

The hearings in Detroit proceeded against a background of charges and countercharges in the public press between Henry Kaiser, the dominant figure in Kaiser-Frazer, and Cyrus Eaton, the dominant figure in Otis & Company. This controversy arose in connection with the manipulative stabilization of the stock of Kaiser-Frazer in preparation for the offering of its shares, which is the subject matter of the instant action. The relevant facts as to this controversy are stated by Judge Allen as follows (203 F. 2d at pp. 318-9):

> "• • • The manipulation and stabilization transaction [arose] out of claimed violations in 1948 by Kaiser-Frazer of Sec. 9(a) (2) of the Securities Exchange Act of 1934. Kaiser-Frazer had agreed with three underwriters to offer an issue of 1,500,000 shares of stock for sale to the public at the close of the market on February 3, 1948. It was arranged that Kaiser-Frazer should stabilize the stock by purchase until the close of the New York Curb, and it was estimated that Kaiser-Frazer, in

order to stabilize, should purchase not more than 25,000 shares. These arrangements miscarried and, as a result Kaiser-Frazer purchased 186,200 shares of its own stock at a price of $13.50 per share. Later Otis & Company and the First California Company, two of the underwriters, notified the corporation that they would not handle the stock and so the stock sale was completely abortive. Out of this transaction hostility and litigation arose between Kaiser-Frazer and Otis & Company. A suit was filed by Kaiser-Frazer in New York for damages for breach of contract by Otis & Company due to its failure to accept and pay for the stock which it had contracted to underwrite was successful in the United States District Court. But the Court of Appeals for the Second Circuit reversed the judgment below and directed entry of judgment for defendants upon the ground that Kaiser-Frazer in this transaction misrepresented certain items of profit in the prospectus and registration statement and that Otis & Company was thus released from liability. *Kaiser-Frazer Corp.* v. *Otis & Co.*, 195 F. 2d 838. Certiorari denied, 344 U. S. 856.

The Court of Appeals for the Second Circuit declared in that case, pages 843, 844: 'Kaiser-Frazer stated its earnings in such a way as to represent that it had made a profit of about $4,000,000 in December 1947. This representation was $3,100,000 short of the truth . . . Any sale to the public by means of the prospectus involved here would have been a violation of the Securities Act of 1933, 15 U. S. C. A. 77l (2).'"

The litigation referred to by Judge Allen was pending and undecided during the Detroit proceedings. Throughout these proceedings proponents of the settlement re-

peatedly charged that the various stockholder actions, including the instant action, were inspired by Eaton in furtherance of his feud with Henry Kaiser. Of course, this unfounded alleged motivation of the stockholders' actions is immaterial upon a trial of such actions on their merits. *Young* v. *Higbee Corp.*, 324 U. S. 204, 212. Nevertheless, the Court, upon this irrelevant issue, admitted hundreds of pages of testimony taken in another proceeding, and plainly incompetent in a judicial proceeding. This occurred as follows:

As purported proof of the assertion that Eaton had inspired the Masterson suit, the proponents offered en masse the testimony of twenty (20) witnesses, covering some two thousand (2,000) pages, which was taken in an ex parte investigation conducted by the Securities and Exchange Commission. The plaintiff in the case at bar, and others of the objecting stockholders, did not participate in the SEC hearings in any fashion. Otis and Masterson, and their respective counsel, were present at certain of the hearings, but were not permitted to cross-examine on the ground that the SEC was not conducting a trial but an investigation. The proferred testimony was objected to as incompetent. After several days' consideration the Court admitted the testimony for the following reasons, among others (3996-7):

> "The Court: This may go on the record. The Court holds that the SEC testimony is relevant for any or all of the following reasons:
>
> First, the approval or non-approval of the offer of settlement is a matter within the discretion of this Court.
>
> Second, in arriving at its conclusion, the Court is not bound by the strict rules of evidence;
>
> Third, it being a matter of discretion, the motive of those either opposing or proposing the settle-

ment may be considered by the Court in arriving at that conclusion;

* * * *

"Fifth, while the motive of one bringing a suit (even to the extent of changing one's residence in order to acquire jurisdiction), may not be inquired into, and while equity follows the law, and legal rights of an individual are the same regardless of what prompted the suit. The courts apparently draw a distinction, and rightly so in this Court's opinion, where the matter is not one of legal right but of discretion, and although motive in such an instance might or might not be controlling, it may be considered by the Court as affecting, among other things, credibility, sincerity, and whether the proposed settlement would be for the benefit of the company and for the best interests of the stockholders therein" (3996-3997).

The final reason, supra, for admitting evidence concededly not admissible in a judicial proceeding was more vigorously phrased during the preliminary discussion before the taking of evidence (579; some of what follows has been quoted earlier in a different context):

"The Court: * * * I think lawsuits like this do a tremendous harm to a corporation. I think time is of the essence, so far as the existence of the corporation is concerned, the possible existence. And successfulness, whether the company is successful, will hang in abeyance for the time being.

Mr. Schofield: No.

The Court: Yes.

Mr. Schofield: Not on these lawsuits, surely.

The Court: If I become convinced that *these*

suits were started from an ulterior motive, I will end this mighty quick." (Emphasis ours.)

Obviously, a judicial proceeding could not be "ended mighty quick" because the Court became convinced of the irrelevant circumstance, even assuming it to be true, that the proceeding was started "from an ulterior motive." In fairness to the Court, this can only be explained upon the basis that he was firmly convinced that he was not conducting a judicial but an administrative proceeding.

3. On Appeal Proponents Argued to the Court of Appeals that the Detroit Proceeding Was Not a "Trial" but a "Discretionary Proceeding" Where the Court, Exercising "Administrative" Rather Than "Judicial" Function, Must Exercise "Business Judgment". This Argument Prevailed and the Majority of the Court of Appeals so Held in Substance.

On appeal plaintiff and the other objecting stockholders relied for reversal principally on three points: (1) fraud in the negotiations; (2) erroneous appraisal of the merits of, and probable recoveries in, the stockholders' claims; and (3) disproportion between the value of the stockholders' claims, as against the consideration offered in settlement.

The opposing arguments were, in summary: (1) that fraud is immaterial, the reasoning being that the Court sits in an administrative capacity, and his duty is to exercise business judgment, and to decide whether the settlement is in the interests of the company; and (2) the Court's appraisal, that the benefit to Kaiser-Frazer of the considerations offered in settlement exceed the value of the claims surrendered, is so much a matter of business

judgment as to leave an ample margin for any errors which the Court made in underestimating the merits of the respective causes of action.

Thus, the brief on appeal of the individual defendants contains the following statements and arguments: The proceeding below was not a "trial" but a "discretionary proceeding" (51), in which a wide variety of factors could be considered, including factors such as "the harm which the continuance of the litigation may do to the reputation of the corporation" (33). It was not the function of the District Court "to try the merits involved in each cause of action" (33). "In view of the complex questions which the District Court has to decide, the situation is one, as in the case with every approval of the compromise of litigation, where the Court must exercise *business judgment*" (33-34; emphasis supplied). And defendants quoted from the decision of the Court of Appeals for the Sixth Circuit in *Reconstruction Finance Corp.* v. *Kentucky River Coal Corp.*, 114 F. 2d at p. 942, the following expression:

> "A court's decision on a matter of business policy is *administrative* in nature rather than *judicial* and cannot be disturbed on review unless there was an abuse of discretion." (Emphasis ours.)

So far did defendants go in this argument, that in their reply brief they said (p. 5): "In fact, the existence of an agreement is not even a necessary condition precedent to an application for approval of a settlement under Rule 23(c)." In other words, a 23(c) proceeding, on defendants' theory, does not involve a suit "of a civil nature * * * cognizable * * * at law or in equity (Rule 1, F. R. C. P.), but envisages only the situation in which two parties, interested in a possible settlement, work out the terms in conference with the District Judge sitting "as a third party to the compromise."

The Pergament brief was to the same effect but directed with greater particularity to the issue of fraud in negotiations. Its burden was: The settling stockholders merely set in motion the machinery for approval, but power is in the Court, not the stockholders, to compromise (47). The authorities requiring full disclosure as a prerequisite to a valid release from a corporation to its directors, "including the much cited *Irving Trust Co.* v. *Deutsch*, 73 F. 2d 121, involve completed releases. In none of them was application *first* made to the court, as in the case at bar, before the release became effective. In the ordinary trustee-cestui relationship, the ratification is by the cestui. In representative actions, including stockholder derivative suits, *such 'ratification' is by the court.* Appellants make no claim that any material fact was not disclosed *to the Court* before its final approval of the settlement agreement" (p. 52; emphasis ours except as to the word "first").

The majority of the Court of Appeals adopted this argument in the following words (203 F. 2d 329-331; 336; emphasis supplied):

> "It has always been our view, however, that the principle governing responsibility for inequitable or illegal conduct is not to be applied in a vacuum but that those who complain of it must show that they were injured thereby (citing cases). This leads us to the view that the *crucial question* in this derivative suit is whether the settlement arrived at between representatives of the stockholders and the corporate and individual defendants was at the time and under the circumstances in which it was arrived at and considered by the District Judge, *for the best interests of the Kaiser-Frazer Company.*"

* * * * *

Affidavit of Lewis M. Dabney, Jr.

"We are not to be led into a discussion of the many contentions urged upon the court to the effect that the negotiators of the settlement on behalf of the corporation were not fully informed; that material information was concealed from them; that the lawyers participating occupied a dual role; or that there was no arm's length bargaining. The settlement agreement did not, and could not, become effective without the approval of the court under the mandate of Rule 23(e). *The District Judge was, therefore, a third party to the compromise.* There is no contention, and there could be none, that in approving the compromise important information was concealed *from him* or that *his* participation in the settlement was subject to any infirmity. Every possible aspect of opposition was fully by him explored. In any event, he ruled against the objectors upon these matters upon the consideration of substantial evidence and in the exercise of a sound judicial discretion.

. . . . .

". . . we are unable to conclude that the District Judge was clearly erroneous in his major findings, or *abused his discretion* in his ultimate conclusions."

THE GRATUITOUS RELEASE OF THE CLAIM HEREIN ASSERTED.

This claim, as previously stated, was lumped with several other claims, all of which were settled for three items of consideration: (1) $500.00 in cash, all of which was paid by Permanente Metals Corporation in consideration of the release of a claim asserted solely against it, which had nothing to do with the claim in suit; (2) the pur-

chase by Kaiser Fleetwings Co., the defendant in one of the other asserted claims (which the District Court found to have substantial merit) of certain metal presses, the property of Kaiser-Frazer, for their depreciated book value; and (3) the guaranty by certain companies controlled by Henry Kaiser of a loan by RFC to Kaiser-Frazer and one of its subsidiaries.

The undisputed testimony showed that in the settlement negotiations there was *no separate appraisal* of the merits of the claim herein and *no separate consideration* given for the settlement of such claim. The evidence showed that counsel for the settling stockholders thought the claim "was a very weak cause of action" (925). The District Court found that the claim had "absolutely no merit." However, the Court of Appeals held that the claim has merit, and that the damage recoverable is measured by the difference between the price of $13.50 a share which defendants caused Kaiser-Frazer to pay for the 186,200 shares purchased in the abortive stabilization, and the value of these shares at the time of the trial (203 F. 2d, at p. 333). The market value of such shares is now $2.25 per share. Accordingly, the damages now recoverable would be over $2,000,000, and, including interest, would run over $2,600,000.

LEWIS M. DABNEY, JR.

(Sworn to December 21, 1953.)

Reply Affidavit of Lewis M. Dabney, Jr., Read in Opposition to Motion.

(Cert. tr., pp. 152-158.)

[SAME TITLE.]

State of New York,
County of New York—ss.:

LEWIS M. DABNEY, JR., being duly sworn, makes this reply affidavit.

The reply affidavit of Mr. Hughes is wholly directed to showing that the District Court in Detroit found (1) that there was no fraud in the bargaining; and (2) that plaintiff, in various statements and arguments has so recognized. The entire record is before the Court and speaks for itself. Accordingly, I will confine this affidavit to (1) the more important misstatements and omissions in the Hughes affidavit respecting the contents of the record; and (2) Mr. Hughes' references to matters outside the printed record on appeal which is now before the Court.

A

Page 4 of the Hughes affidavit states that the District Court found "that there was no 'collusion, fraud, concealment or unfair dealing in arriving at the compromise' and that 'there was arms-length bargaining.'" What the Court actually said was (R 242, 93 F. Supp. at p. 21):

> "But here *we do not* find any collusion, fraud, concealment or unfair dealing in agriving at the compromise and *we hold* there was 'arms-length bargaining.'" (Emphasis ours.)

It is apparent from the above that the District Court failed to make findings on the issues of "collusion, fraud, concealment or unfair dealing," which is emphasized by the fact that he, immediately thereafter, affirmatively found that there was "arms-length bargaining." In a reply memorandum we will show that this failure to find on the part of the District Court, was not inadvertent but was consistent with his rulings, throughout the trial, that the issues of concealment and unfair dealing and of fraud and collusion (in the sense of constructive fraud) were immaterial.

Mr. Hughes, when he made his affidavit, was well aware of our contention that the words above quoted from Judge Picard's opinion amount not to a finding that there was no constructive fraud and concealment or misleading, but to a failure to find on the subject. This contention was previously made before the Court of Appeals, and, as our memorandum will show, the Court of Appeals accepted it. That Mr. Hughes is not altogether satisfied with Judge Picard's language is shown by his failure to quote it accurately and in full.

B

Mr. Hughes (p. 5 Reply Affidavit) quotes a statement which I made in argument before Judge Picard that the necessary effect of a settlement in the Detroit proceedings would be to destroy the Stella action. This statement was made before the taking of testimony had begun and was based upon two assumptions under which I was laboring at the time but which turned out to be erroneous, viz. that the proceedings were to be conducted as judicial proceedings, and that the settlement would not be approved if fraudulently arrived at.

Subsequently, before the Court of Appeals, I am al-

leged to have made the statement that "the settlement approved below will forever release the defendants from their wrongdoings." I do not have a copy of my arghment before the Court of Appeals and am unwilling to accept Mr. Hughes' statement as complete or accurate. Assuming that I made this statement, I was evidently still laboring under the erroneous impression that the proceedings were judicial and that the settlement would not be approved if found to be fraudulently negotiated. It was only after the Court of Appeals determined that the District Judge sat not in his ordinary capacity as a judge determining controversies, but as a "third party to the compromise" who could disregard fraud in the settlement if he considered the settlement nevertheless in the interests of the Company, that I concluded that the Detroit proceedings were not and could not be res judicata. If there is any legal doctrine other than res judicata whereby the Detroit proceedings could "destroy" an action pending before this Court, Mr. Hughes has yet to indicate what that doctrine is.

C

The statement quoted by Mr. Hughes from our original application for fees filed in the District Court in Detroit was similarly made before the true nature of the proceedings had been revealed by the majority decision of the Court of Appeals. The original petition for fees was filed even before the appeal was perfected and over our objection that all fee proceedings should be postponed to await the determination of the appeal. On pages 3 and 4 of such application the following appears:

> "Petitioners, on behalf of their respective clients, opposed the settlement, have appealed from the order approving it, and have sought to have the

filing of applications for compensation and reimbursement of expenses deferred until after the determination of the said appeal. However, the petitioners were overruled. They are constrained, therefore, to make their application at this time, and to predicate it upon the assumption that the Court's determination as to the merits of the settlement and its value to K-F is correct in all respects and will be affirmed.

In so proceeding, the petitioners do not waive their objections to the settlement. They intend to press such objections on the appeal herein, and they expressly reserve the right to do so."

The quotation from our supplemental application which was filed after the Supreme Court had refused certiorari is incomplete and misleading. The language of the application was that of one of my associates, representing another stockholder, who prepared and signed the application and was authorized to sign in my behalf. The following statement in that application is omitted by Mr. Hughes:

"It appeared from careful study of the majority opinion that the Court felt, as this Court had, that the judicial review and the full disclosures made at hearing were sufficient to satisfy the requirements of Rule 23c of the Federal Rules of Civil Procedure, even assuming arguendo that there was no arm's-length bargaining."

D

The order approving the compromise to which Mr. Hughes refers was prepared not by the Court, but by Mr. Hughes and/or his associates. Obviously, the recital

in the order goes beyond the opinion. The order is in its own proceeding of course effective according to its terms; but for purposes of res judicata it will not prevent this Court from examining the entire record to see what was litigated and determined therein. *Oklahoma* v. *Texas*, 256 U. S. 70, 86.

E

Since defendants admittedly do not rely on res judicata, and since this Court is accordingly not bound to follow Judge Picard in approving the Detroit agreement of settlement, this Court must, if it does not try the case on the merits, independently examine the advisability of the settlement. In such examination the Court must consider the situation as it now is, and not as it was in 1950 when Judge Picard decided to approve the settlement. It is now apparent that Judge Picard seriously underestimated the merits of the instant case and seriously overestimated the value of the consideration received in settlement.

1. Judge Picard held that the claim presented in the instant action had "absolutely no merit" (93 Fed. Supp. at p. 35). The Court of Appeals subsequently held that it was a valid claim which if litigated would now result in a recovery of over $2,000,000 (plaintiff's answering affidavit, p. 30).

2. The principal reason for Judge Picard's approval of the settlement was that he thought that the guaranty of the RFC loan which was the principal consideration offered in settlement, would give Kaiser-Frazer a "fighting chance" to survive (93 F. Supp. at p. 29). The Court of Appeals, in affirming again stressed the major importance of the fact that the guaranty gave Kaiser-Frazer

a "chance to live" (203 F. (2d) at p. 336). This chance has now greatly decreased and it is now perilously close to zero.

The financial condition of Kaiser-Frazer on June 30, 1953, is discussed in an article in the Wall Street Journal of October 22, 1953, copy of which is hereto annexed as Exhibit A. It appears from the article that Kaiser-Frazer lost over $10,000,000 in the six months ended June 30, 1953. It further appears that it will not disclose its balance sheet nor comment as to the correctness of a balance sheet which the Wall Street Journal has obtained from another source, and which, according to that paper shows that as at June 30, 1953, Kaiser-Frazer had long term debt of over $66,000,000 and current liabilities of over $21,000,000 and that "the total stockholders' investment was represented as a deficit figure of $2,070,109 against an original paid-in capital of $66,797,714."

A report in Standard Statistics under date of December 7, 1953, shows that in the three months ended September 30, 1953, Kaiser-Frazer reported an additional loss of $4,558,703. This reduced its stockholder equity as at that date to a *deficit* of over $6,000,000. Accordingly, at that date Kaiser-Frazer was, per books, insolvent. To demonstrate its solvency in the bankruptcy sense, Kaiser-Frazer would have to show that the fair value of its assets exceeded the book value by over $6,000,000.

It is therefore apparent that Kaiser-Frazer is either now insolvent in the bankruptcy sense, or on the verge of insolvency. According to current press reports, Kaiser-Frazer is shut down and is producing no automobiles. The present year by common consent, will be a hard year in the automobile business in which even the leaders of the industry will have hard sledding.

Of course, the claim herein prosecuted and other claims settled in Detroit do not appear as assets on the books

of Kaiser-Frazer. Excluding any value which these claims may have, Kaiser-Frazer is now, on information and belief, insolvent. Neither the majority nor the minority in the Court of Appeals attempted to put a dollar value on these claims but the reasoning of the majority as applied to the facts in the record would indicate that these claims had a value of between $4,000,000 and $5,806,000; whereas the reasoning of Judge Allen would indicate that these claims had a value of $9,000,000 to $10,000,000. Accordingly, the only chance of the stockholders of Kaiser-Frazer realizing anything from their investment in this Company of over $66,000,000 (see Wall Street Journal article) lies in their being allowed to prosecute these claims.

While these facts have no relevance, if the Detroit proceedings are res judicata they have great relevance if such proceedings are not res judicata; and in the event that this Court agrees with the holding of Vice-Chancellor Seitz in Delaware (which will be discussed in our memorandum) that the proceedings in Detroit are only to be taken into account along with other facts, I submit that the above facts should properly have great weight in determining whether this Court will now ratify the Detroit settlement.

LEWIS M. DABNEY, JR.

(Sworn to January 13, 1954.)

Memorandum Opinion of the District Court.

(Cert. tr., pp. 160-161.)

[SAME TITLE.]

(The Original Opinion is Endorsed on the Moving Papers)

The identical claims asserted in the instant derivative suit brought on behalf of the Kaiser-Frazer Corporation were alleged in *Pergament* v. *Joseph W. Frazer, et al.*, a derivative suit filed by another stockholder of the same corporation. The Pergament suit was settled after proceedings duly had under Rule 23(c) F. R. P. C. upon due notice. The plaintiff herein appeared in these proceedings and objected to the settlement proposed; his objections after full hearing were overruled (98 F. Supp. 9, aff'd 203 F. 2d, 315 (6th Cir. 1953) cert. den. October 12, 1953, Docket No. 133).

The settlement in the Pergament suit released all the defendants named in the instant suit from any and all claims arising out of the matters alleged herein. It was determined that fraud was not present in the accomplishment of the Pergament action, but, in any event, the settlement may not be here collaterally attacked after judicial approval.

Motion granted; complaint dismissed with prejudice, without costs; the Clerk is directed to enter judgment accordingly.

SYLVESTER J. RYAN,
U. S. D. J.

2/11/54

Judgment.

(Cert. tr., p. 163.)

[SAME TITLE.]

The defendants, having moved this Court for an Order granting to the defendants summary judgment and dismissing the complaint herein, and said motion having duly and regularly come on to be heard;

Now, upon reading and filing the Order to Show Cause dated November 24, 1953, the motion to amend said Order to Show Cause dated November 30, 1953, and the Order of Judge Thomas F. Murphy dated November 30, 1953 amending said Order to Show Cause, and the affidavit of Mark F. Hughes verified the 24th day of November, 1953 and the exhibits attached thereto, the affidavit of H. Bartow Farr, Jr. verified the 30th day of November, 1953, the affidavit of Mark F. Hughes verified the 7th day of January, 1954 and the exhibits attached thereto, except for Exhibits 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18 and 19 and the affidavit of Alfred Virdirosa, verified the 2nd day of December, 1953, establishing proof of publication of a notice to the stockholders of the defendant corporation, all in support of said motion, and the affidavit of Lewis M. Dabney, Jr. verified the 4th day of December, 1953, the affidavit of Lewis M. Dabney, Jr. verified the 21st day of December, 1953 and the affidavit of Lewis M. Dabney, Jr. verified the 13th day of January, 1954 and the exhibit attached thereto in opposition to said motion, and after hearing H. Bartow Farr, Jr. and Francis B. Delehanty, Jr. in support of said motion, and Lewis M. Dabney, Jr. in opposition thereto, and the Court having concluded that the defendants are entitled to summary judgment as a matter of law and to dismissal of the complaint with prejudice;

Judgment.

Now, on motion of Willkie Owen Farr Gallagher & Walton and Corbin Bennett & Delehanty, attorneys for the defendants, and upon filing the memorandum opinion of the Court, it is

ORDERED AND ADJUDGED, that the said motion be and the same hereby is granted, that the complaint herein be dismissed with prejudice, but without costs.

Dated: New York, N. Y.
February 19, 1954.

WILLIAM K. CONNELL
Clerk

February , 1954

.....

No. 202

Office - Supreme Court, U. S.
FILED
JUL 1 1947
HAROLD B. WILLEY, Clerk

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT.

MICHAEL STELLA, on behalf of himself and all other stockholders of Kaiser-Frazer Corporation,

Plaintiff-Appellant,

against

HENRY J. KAISER, JOSEPH W. FRAZER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., WALSTON S. BROWN and KAISER-FRAZER CORPORATION,

Defendants-Appellees.

APPENDIX TO BRIEF FOR APPELLEE.

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Designation of Portion of Record to be Printed.

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT.

MICHAEL STELLA, on behalf of himself and all other stockholders of Kaiser-Frazer Corporation,

Plaintiff-Appellant,

against

HENRY J. KAISER, JOSEPH W. FRAZER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., WALSTON S. BROWN and KAISER-FRAZER CORPORATION,

Defendants-Appellees.

Henry J. Kaiser, Joseph W. Frazer, Edgar F. Kaiser, G. G. Sherwood, E. E. Trefethen, Jr., Clay P. Bedford, W. A. MacDonald, O. B. Motter, Hickman Price, Jr., Walston S. Brown and Kaiser-Frazer Corporation, appellees herein, hereby designate the following portions of the record as the portions which they think it necessary to print in order fairly to present the question on appeal:

1. The complaint in the above entitled action.

2. The order to show cause dated November 24, 1953 and the affidavit of Mark F. Hughes verified the 24th day of November, 1953 annexed thereto together with Exhibits 1, 2 and 3.

Designation of Portion of Record to be Printed.

3. The affidavit of Alfred Virdirosa, verified the 2nd day of December, 1953 together with a copy of the notice to stockholders referred to therein.

4. The affidavit of Lewis M. Dabney, Jr. verified the 4th day of December, 1953 through line twenty-four on page 4 of said affidavit concluding with the words "two other cases".

5. The affidavit of Mark F. Hughes verified the 7th day of January, 1954 together with Exhibits 20 and 21.

Dated: July 12, 1954.

WILLKIE OWEN FARR GALLAGHER & WALTON

By MARK F. HUGHES
A Member of the Firm.
Attorneys for Defendant, Kaiser-Frazer Corporation.

CORBIN BENNETT & DELEHANTY,

By FRANCIS B. DELEHANTY, JR.
A Member of the Firm.
Attorneys for Defendants, Henry J. Kaiser, *et al.*

Complaint.

[SAME TITLE.]

MICHAEL STELLA, plaintiff herein, brings this action on behalf of himself and all other stockholders of Kaiser-Frazer Corporation similarly situated against Henry J. Kaiser, Joseph W. Frazer, Edgar F. Kaiser, G. G. Sherwood, E. E. Trefethen, Jr., Clay P. Bedford, W. A. MacDonald, O. B. Motter, Hickman Price, Jr., Walston S. Brown and Kaiser-Fraser Corporation, defendants herein, and alleges:

1. Plaintiff is a resident of the City and State of New York. Defendant Henry J. Kaiser (hereinafter called Kaiser) resides in the City of Oakland, California. Defendant Joseph W. Fraser (hereinafter called Fraser) resides in the City of Willow Run, Michigan. Defendants Edgar F. Kaiser, Clay P. Bedford, W. A. MacDonald, O. B. Motter, and Hickman Price, Jr., all reside in the City of Willow Run, Michigan. Defendants G. G. Sherwood and E. E. Trefethen, Jr., reside in the City of Oakland, California. Defendant Walston S. Brown resides in the City of New York, New York. Defendant Kaiser-Fraser Corporation (hereinafter called Kaiser-Fraser) is a corporation organized and existing under the laws of the State of Nevada and has its principal place of business at Willow Run, Michigan.

2. This Court has jurisdiction by virtue of Section 27 of the Securities Exchange Act of 1934 (Title 15, Sec. 78aa, U. S. C. A.), Section 22(a) of the Securities Act of 1933 (Title 15, Sec. 77v(a), U. S. C. A.), and Section 24 of the Judicial Code, as amended (Title 28, Sec. 41(8), U. S. C. A.).

3. At the time of the transactions hereinafter complained of plaintiff was and still is, the owner and holder of shares of stock in defendant Kaiser-Frazer. Plaintiff

brings this action on behalf of Kaiser-Frazer against the remaining defendants named in paragraph 1 (hereinafter called the individual defendants). This action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction.

4. All of the individual defendants, at the time of the transactions hereinafter complained of were, and (upon information and belief), they now are, directors of defendant Kaiser-Frazer. In addition, they held the following respective offices in Kaiser-Frazer:

Henry J. Kaiser	Chairman of the Board
Joseph W. Frazer	President
Edgar F. Kaiser	Vice President and General Manager, Chairman of the Executive Committee
G. G. Sherwood	Treasurer, Assistant Secretary
E. E. Trefethen, Jr.	Vice President, Assistant Secretary
Clay P. Bedford	Vice President, Member of Executive Committee
W. A. MacDonald	Vice President, Assistant Secretary, Member of Executive Committee
O. B. Motter	Vice President
Hickman Price, Jr.	Vice President, Member of Executive Committee
Walston S. Brown	Secretary

Said individual defendants, at the time of the transactions hereinafter complained of, constituted the active management of defendant Kaiser-Frazer, and are hereinafter sometimes referred to as "the management".

5. Defendant Kaiser-Frazer was organized on August 5, 1945. Defendants Kaiser and Frazer were the active promoters of the corporation. They caused it to be formed and individually and through their various business enterprises supplied its initial capital. They selected and caused to be appointed its initial officers and directors, most of whom are still officers and directors of Kaiser-Frazer. The present individual defendants, other than Kaiser and Frazer, were selected as officers and directors by, and owe their appointment to, defendants Kaiser and Frazer. Defendant Edgar F. Kaiser is a son of defendant Henry J. Kaiser. Defendants Sherwood, Trefethen and Bedford are former and present associates of defendant Kaiser in other businesses and interests which are controlled by Kaiser. Defendants Price, MacDonald and Motter are present and former associates of defendant Frazer in other businesses and interests controlled by Frazer. Defendant Brown is a partner in a firm of lawyers who have been, since October 1945, and now are, general counsel of defendant Kaiser-Frazer.

6. At all times since the organization of Kaiser-Frazer defendants Kaiser and Frazer have owned, held and controlled, directly and indirectly, either a majority of the stock of said corporation or a substantial minority thereof. On information and belief, at the time of the transactions hereinafter complained of defendants Kaiser and Frazer directly and indirectly through various corporations, organizations and voting trusts which they controlled, held, owned and controlled more than 30% of the stock of Kaiser-Frazer.

7. At all times since the organization of Kaiser-Frazer said corporation has been, and it now is, completely dominated and controlled by defendants Kaiser and Frazer. At all times since the organization of said corporation the directors and officers of Kaiser-Frazer (other than Kaiser and Frazer themselves) have been, and they now are, dominated and controlled by Kaiser and Frazer.

8. The transactions hereinafter complained of were effected at the instance of defendants Kaiser and Frazer; and said Kaiser and Frazer were the primary actors in causing to be done the transactions hereinafter complained of. The remaining individual defendants, acting as officers and directors of defendant Kaiser-Frazer, participated in and approved of said transactions, and from time to time approved the various legal and corporate actions which had to be taken in order to effect said transactions.

9. On November 30, 1947, Kaiser-Frazer owed the Bank of America National Trust and Savings Association a balance of $11,280,000 on certain notes. These notes were guaranteed jointly and severally, by Joseph W. Frazer and by Henry J. Kaiser Company, the Kaiser Company, Kaiser Engineers, Inc. (hereinafter referred to as the Kaiser interests). Said Kaiser interests were corporations substantially owned and controlled by Kaiser. This balance was payable in monthly installments of $360,000 beginning on December 1, 1947, with the remaining balance payable August 1, 1949. All of the above-described notes were paid off in full by Kaiser-Frazer prior to December 31, 1947.

10. Upon information and belief:

Kaiser and Frazer caused Kaiser-Frazer to prepay the notes as above set forth. The predominant motive and reason for this action was to relieve the Kaiser interests

and Frazer of their joint and several guarantee of the above-described notes. In so doing Kaiser and Frazer caused Kaiser-Frazer to deplete its working capital to such an extent as to require new financing. This action was solely in the personal interests of Kaiser and Frazer and contrary to the interests of Kaiser-Frazer. Said prepayment was made without any commitment for such new financing from any quarter and without any assurance that such new financing could be obtained by Kaiser-Frazer on any reasonable basis.

11. About January 1948, the management of Kaiser-Frazer decided to issue and sell to the investing public new shares of stock in order to raise additional funds for Kaiser-Frazer. Such funds were necessary in order to build up the working capital of Kaiser-Frazer and to purchase certain items of plant and property which Kaiser-Frazer needed in its business.

12. About January 1948, the management of Kaiser-Frazer entered into negotiations with certain underwriters, to wit, Otis & Company, First California Company, and Allen & Company. These underwriters had previously underwritten and sold to the public shares of stock of defendant Kaiser-Frazer. It was decided that Otis & Company would be the leading underwriter. Thereafter Otis & Company and the dominating personality in that organization, to wit, Cyrus Eaton, took the lead in the negotiations with the management of Kaiser-Frazer.

13. Upon information and belief:

After preliminary negotiations, an underwriting contract was entered into between Kaiser-Frazer, Otis & Company, First California Company and Allen & Company, whereby said underwriters agreed to purchase from Kaiser-Frazer 1,500,000 shares of new stock of said corpora-

tion. The purchase price and the resale price to the public were left blank.

14. In the month of January 1948, a registration statement, covering the proposed offering of said 1,500,000 shares, was filed with the Securities and Exchange Commission. Such registration statement, however, was not complete and therefore was not permitted to become effective, until February 3, 1948, after 3 p.m., Eastern Standard Time, of that date, which was the time of closing of the market on the New York Curb Exchange.

15. At and long prior to the transactions complained of the stock of Kaiser-Frazer was registered on several national securities exchanges, to wit, The New York Curb Exchange, the principal market for said stock (hereinafter called the Curb Exchange), the San Francisco Stock Exchange, the Los Angeles Stock Exchange, the Detroit Stock Exchange and the Boston Stock Exchange. During the year 1947 and the year 1948 up to and including February 2, 1948, the price of said stock on the Curb Exchange had fluctuated from a high of $18.25 to a low of $5 per share. The price of the said stock on the other exchanges above-named were at all times substantially identical with the contemporaneous price on the Curb Exchange. Said fluctuation was due in part to the fact that Kaiser-Frazer was a new corporation and, to a greater extent, to the fact that Kaiser-Frazer was engaged in the business of manufacturing automobiles and the automobile business had been a very difficult business for newcomers.

16. At the time of the transactions hereinafter complained of Kaiser-Fraser was confronting difficulties in addition to the difficulties due to the highly competitive nature of the automobile business and to the fact that Kaiser-Frazer was a newcomer therein. These difficulties arose from the nationwide shortage of steel and other

materials. Upon information and belief, the principal steel companies and other suppliers of steel had traditional relationships with the older established automobile companies and, to a certain extent, gave these companies a preference in purchasing available steel. As a result, Kaiser-Frazer was forced to purchase part of its steel requirements at prices higher than those paid by its competitors; and for other parts of such requirements it was required to engage in various barter deals, resulting in cross-hauling of material and other uneconomic transactions. The result of these practices was necessarily to increase the cost of steel and other materials to Kaiser-Frazer and to put it in a poor competitive position as contrasted with the older companies. These facts were well known to the better informed members of the investing public; and the management of Kaiser-Frazer knew that in the registration statement and prospectus filed pursuant to the Securities Act of 1933 the corporation would be required to make a full disclosure with respect to these facts.

17. It was recognized by the management of Kaiser-Frazer that the public would not purchase new shares of stock of Kaiser-Frazer at a price in excess of the price at which existing shares of such stock could be purchased on the market. For this reason, throughout the said month of January, said management and underwriters watched the daily market price of said stock. It was the plan of said management and underwriters that when it was agreed that the market was satisfactory, the offering of new shares would be made at or about the market price.

18. On February 2, 1948, the market for Kaiser-Frazer stock on the Curb Exchange closed at 13½. 6,800 shares of said stock were sold on that day at prices ranging from a low of 13⅜ to a high of 13¾. The closing bid and asked price was 13½-13⅝. There were active conversations

between the management of Kaiser-Frazer and the underwriters during and preceding February 2, 1948. Defendant Kaiser took the lead on behalf of the Kaiser-Frazer management and Eaton of Otis & Company took the lead on behalf of the underwriters. As a result of said conversations said management and underwriters, prior to the opening of the market on February 3, 1948 (10:00 a.m., Eastern Standard Time) verbally agreed that on said day Kaiser-Frazer would enter firm bids on the Curb Exchange and on the other national securities exchanges mentioned in paragraph 15 hereof, at 13½; and that Kaiser-Frazer would purchase all the stock offered at said price. At the same time preparations were being carried forward by the lawyers for Kaiser-Frazer and for the underwriters to complete the registration statement and the prospectus and to have the registration statement become effective. It was planned that such registration statement would become effective after the close of the market (3 p.m., Eastern Standard Time) on February 3, 1948.

19. Before the registration statement and prospectus could become effective it was necessary, as said management and underwriters well knew, for the underwriting agreement to be put in final form and executed. This necessitated the filling in of the blanks previously existing in the contract respecting the price which the underwriters should pay to Kaiser-Frazer and the price at which the stock should be sold to the public. Said management and underwriters well knew that in order for the underwriters to be able to sell to the public at the specified price the market price would have to equal or exceed the proposed offering price. This was the reason for the verbal agreement between said management and underwriters that defendant Kaiser-Frazer should, on February 3, 1948, purchase all the stock that was offered on the Curb Exchange at 13½.

20. Prior to the opening of the market on February 3, 1948, Kaiser-Frazer placed through its brokers on the Curb

Exchange and on the other national securities exchanges mentioned in paragraph 15 hereof orders to purchase at 13½ all stock which was offered. Almost immediately after the opening of the market it became apparent that the offers of stock were, and would continue to be, much greater than had been contemplated. With full notice of said fact, and after discussing it, the management continued in force and did not withdraw the orders previously given to its brokers and continued to purchase all Kaiser-Frazer stock offered on said national securities exchanges at 13½. Prior to the close of the market on that day Kaiser-Frazer purchased on said national securities exchanges 186,200 shares of its stock. Most of said purchases were made on the Curb Exchange and said transactions and acts occurred and took place in the City, County and State of New York. Said purchases constituted and accounted for the bulk of the trading on said exchanges on that day in the stock of Kaiser-Fraser. The price paid for said stock, plus brokers' commissions, was in excess of $2,500,000.

21. Throughout the day representatives of said underwriters and said management were in touch with personnel of the Securities and Exchange Commission, making every effort to see that the registration statement became effective at the close of the market on that day. During the course of the day said representatives of the Securities and Exchange Commission were informed of the tremendous volume of offerings of Kaiser-Frazer stock; and prior to the closing of the market said representatives of the Securities and Exchange Commission informed said management and underwriters that a full disclosure would have to be made in the prospectus respecting said purchases. Accordingly, a statement was included in the prospectus respecting said purchases in which it was stated that by 1:15 p. m. Kaiser-Frazer had purchased 103,500 shares of its stock at 13½ per share; and after the close of the market and before the registration statement became effective, a rider was

placed on the outside of said prospectus stating that during the entire trading day Kaiser-Frazer had purchased 186,200 shares of its stock at 13½ per share.

22. By virtue of their position as officers and directors the individual defendants stood in a fiduciary relationship to Kaiser-Frazer. As officers and directors they owed it a duty to manage its affairs with due care and with due regard to the laws of the land. A particular and additional fiduciary duty rested on defendants Kaiser and Frazer by virtue of the fact that they were not only officers and directors of Kaiser-Frazer but were its managing and controlling stockholders.

23. In carrying out the transactions hereinabove complained of said individual defendants directly and indirectly through Kaiser-Frazer, by the use of the mails and means and instrumentalities of interstate commerce and by the use of facilities of national securities exchanges above-mentioned, effected a series of transactions in the stock of Kaiser-Frazer which was registered on said national securities exchanges, creating actual active trading in such stock for the purpose of inducing the purchase by the investing public of the stock of Kaiser-Frazer to be issued pursuant to said registration statement.

24. In carrying out the transactions hereinabove complained of said individual defendants violated and caused Kaiser-Frazer to violate Section 9(a)(2) of the Securities Exchange Act of 1934, which provides as follows:

> "Sec. 9(a) It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange—
>
> • • • • • •

"(2) To effect, alone or with one or more other persons, a series of transactions in any security registered on a national securities exchange creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others."

25. In carrying out the transactions hereinabove complained of said individual defendants directly and indirectly through Kaiser-Frazer, by the use of means and instrumentalities of interstate commerce and by the use of the mails and of the facilities of the national securities exchanges above-mentioned, did the following:

(a) They employed a device, scheme and artifice to defraud those members of the investing public who should purchase new shares of Kaiser-Frazer in reliance on the artificial price established by said purchases of stock; and

(b) In expending the funds of defendant Kaiser-Frazer for the purpose of doing an illegal act they acted in breach of their fiduciary duty to Kaiser-Frazer and committed a fraud upon said Kaiser-Frazer.

26. In carrying out the transactions hereinabove complained of said individual defendants violated and caused Kaiser-Frazer to violate Section 10(b) of the Securities Exchange Act of 1934 and Rule X-10B-5 under that law, subparagraphs (1) and (3), which respectively provide as follows:

"Sec. 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange——

* * * * * *

"(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Rule X-10B-5:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

"(1) to employ any device, scheme, or artifice to defraud,

* * * * * * *

"(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

27. In carrying out the transactions hereinabove complained of, said individual defendants violated and caused Kaiser-Frazer to violate Section 17(a)(1) and (3) of the Securities Act of 1933, which provides as follows:

"Sec. 17 (a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly——

"(1) to employ any device, scheme, or artifice to defraud, or

* * * * * * *

"(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

28. The actions of the individual defendants in causing to be carried out the transactions above-mentioned constituted a deliberate, or, in the alternative, a negligent waste of the funds of Kaiser-Frazer. The failure of said defendants to withdraw the purchase orders immediately after it became apparent that a tremendous number of shares, and a number greatly in excess of the shares contemplated, was being or would be unloaded upon Kaiser-Frazer, was particularly culpable.

29. The transactions herein complained of resulted in great loss and damage to Kaiser-Frazer in that

(a) the shares purchased were worth substantially less than the amounts, in excess of $2,500,000, expended in their purchase; and

(b) by virtue of the transactions referred to in paragraphs 10 and 20, the cash of Kaiser-Frazer was substantially reduced. Accordingly, its ability to meet its obligations, carry on its business and make the necessary additions to plant was substantially impaired. As a result Kaiser-Frazer was forced to make material reductions in its operations and in its production of automobiles. As a further result Kaiser-Frazer lost substantial amounts of money and its capacity and ability to produce in the future was materially impaired.

30. Plaintiff has made no demand on the directors of Kaiser-Frazer to bring an action to redress the injuries to Kaiser-Frazer caused by the transactions herein complained of. The reason for plaintiff's failure to make such a demand is that all of said directors are defendants herein

and all of said directors are jointly and severally responsible and liable for the transactions herein complained of. In addition, the individual defendants, other than Kaiser and Frazer, are, as above stated, dominated and controlled by defendants Kaiser and Frazer. Under these circumstances, any demand would be futile.

WHEREFORE, plaintiff prays for the following relief:

(a) That the individual defendants be ordered and directed to purchase from Kaiser-Frazer the number of shares of stock which Kaiser-Frazer purchased on February 3, 1948, paying therefor the price which was paid by Kaiser-Frazer, together with all commissions and other expenses paid and incurred in connection with said purchases.

(b) That the defendant Kaiser-Frazer recover from the individual defendants the damages resulting from the expenditure of cash in the purchase of said shares of stock; and that an accounting be had for the purposes of ascertaining the damages which have been caused to Kaiser-Frazer over and above the amount of money which was expended in the purchase of said stock; and that the individual defendants account for and restore to Kaiser-Frazer the sums found to be due on such accounting; and

(c) That the Court grant to plaintiff and Kaiser-Frazer Corporation such other and further relief as may be just and proper.

LEWIS M. DABNEY, JR.
Lewis M. Dabney, Jr.

ANDERSON & CAREW
Anderson & Carew

LEWIS M. DABNEY, JR.,
JOHN A. ANDERSON,
ISADORE H. COHEN,
Of Counsel.

(Verified by Michael Stella May 10, 1948.)

Order to Show Cause.

[SAME TITLE.]

Upon the annexed affidavit of Mark F. Hughes, verified the 24th day of November, 1953 and all prior proceedings herein, it is

ORDERED, that the parties to this action and the stockholders of the defendant Kaiser-Frazer Corporation show cause at a term of this Court to be held in Room 506 of the United States Court House, Foley Square, City, County and State of New York, on the 10th day of December, 1953 at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made pursuant to Rule 56 of the Federal Rules of Civil Procedure granting to the defendants summary judgment and dismissing the complaint herein upon the ground that the claims asserted in this action have been settled, compromised and discharged by an agreement of settlement approved by an order of the United States District Court for the Eastern District of Michigan, Southern Division, in an action entitled *Pergament, et al.* v. *Joseph W. Frazer, et al.*, 93 F. Supp. 9, aff'd 203 F. 2d 315 (6th Cir. 1953) cert. denied October 12, 1953, Docket No. 133, and granting such other further and different relief as to the Court may seem just and proper; and sufficient reason appearing therefor, it is further

ORDERED, that service of a copy of this order and the moving affidavit upon one of the attorneys of record for the plaintiff on or before the 28th day of November, 1953 be deemed good and sufficient service upon said plaintiff, and it is further

ORDERED, that a notice, substantially in the form of Exhibit 4 annexed to the moving affidavit, be published once by the defendant Kaiser-Frazer Corporation on or before the 30th day of November, 1953 in the New York Times, and it is further

ORDERED, that the publication of said notice in said newspaper as hereinabove prescribed shall be deemed sufficient service upon and notice to the stockholders of Kaiser-Frazer Corporation pursuant to Rule 23 (c) of the Federal Rules of Civil Procedure, and it is further

ORDERED, that a copy of this order and the moving affidavit be filed in the office of the Clerk of this Court on or before the 28th day of November, 1953, and it is further

ORDERED that answering affidavits shall be served on or before the 8th day of December, 1953.

Dated: New York, New York,
November 24, 1953.

THOMAS F. MURPHY,
U. S. D. J.

Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

[SAME TITLE.]

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

MARK F. HUGHES, being duly sworn, deposes and says:

I am a member of the firm of Willkie Owen Farr Gallagher & Walton, attorneys for the defendant Kaiser-Frazer Corporation, now Kaiser Motors Corporation, and for convenience hereinafter referred to as "Kaiser-Frazer." I make this affidavit in support of a motion for summary judgment dismissing the action upon the ground that the subject matter of the action has been compromised and settled and that a release of the claim set forth in the

complaint constitutes a bar to the further prosecution of the action.

This is a stockholders' derivative action on behalf of Kaiser-Frazer which was commenced in May, 1948 and is now at issue. The complaint alleges that in connection with a contemplated public offering of 1,500,000 additional shares of Kaiser-Frazer common stock on February 3, 1948, the individual defendants as officers and directors of Kaiser-Frazer caused it to stabilize the market in the stock at 13½, with the result that it bought 186,200 shares of stock at a cost in excess of $2,500,000. The complaint charges that the stabilization transactions constituted illegal manipulation and were either a deliberate or negligent waste of the funds of Kaiser-Frazer by the individual defendants, which caused Kaiser-Frazer to sustain damages. The several answers, while admitting the stabilization operations, denied that they constituted illegal manipulation or waste.

This action has remained dormant pending the outcome of another stockholders' derivative action instituted in the United States District Court for the Eastern District of Michigan, Southern Division, known as the *Pergament* action, hereinafter more fully described. Because of the settlement of the *Pergament* action, with the approval of the District Court in Michigan, it is now appropriate and proper that summary judgment be granted herein dismissing this action.

Also in May, 1948, an action was instituted in the District Court of the United States for the Eastern District of Michigan, Southern Division, entitled *Jerome R. Pergament and George J. London, etc., plaintiffs,* v. *Joseph W. Frazer, et al., defendants* (Civ. No. 7354). This action was also a stockholders' derivative action brought on behalf of Kaiser-Frazer and naming as defendants, among others, certain of the individual defendants who were joined as defendants in this action. The complaint in the *Pergament* action, as amended, contained various allega-

tions of malfeasance on the part of the officers and directors of Kaiser-Frazer Corporation, including the charges with reference to the stabilization transactions which were the subject matter of the complaint in this action. In the *Pergament* case also the allegations of wrong doing were denied. While the *Pergament* case was pending, the plaintiffs in that action entered into an agreement with the individual and corporate defendants compromising and settling the various causes of action alleged in the complaint in that action, as amended, including the claim or cause of action constituting the subject matter of this action. The settlement agreement provided, among other things, for the release and discharge of each of the individual defendants in this action from any and all liability with respect to the purchase by Kaiser-Frazer of 186,200 shares in the stabilization transactions which are the subject matter of this action. The settlement agreement was subject to the approval of the District Court of the United States for the Eastern District of Michigan pursuant to the provisions of Rule 23(c).

Accordingly, on November 9, 1949 the District Court in Michigan ordered a hearing on the settlement agreement and directed that notice be given to all stockholders. A copy of the order to show cause, notice of hearing, petition of the plaintiff stockholders, settlement agreement, and the amended pleadings in the action are hereto annexed and marked "Exhibit 1." Thereafter and while the hearings on the settlement were in progress, the District Judge directed that a second notice be given to all of the stockholders of Kaiser-Frazer Corporation. A copy of this second notice is hereto annexed marked "Exhibit 2." A copy of each of said notices was duly mailed to each of the stockholders of record of Kaiser-Frazer as directed by said Court. After extended hearings in which all interested parties were given opportunity to be heard and to present their evidence, both in support of and in opposi-

tion to the settlement agreement, the compromise and settlement embraced in said agreement was approved by the District Court in Michigan by order dated September 13, 1950. A copy of said order of approval is hereto annexed marked "Exhibit 3." An appeal from the order of approval was taken by certain stockholders, including the plaintiff in this action, who had opposed the approval of the settlement agreement, with the result that the order of approval was affirmed by the Court of Appeals for the Sixth Circuit. A petition for a writ of certiorari by the objecting stockholders, including the plaintiff in this action, was denied by the Supreme Court of the United States on October 12, 1953 (*Pergament, et al.* v. *Frazer, et al.*, 93 F. Supp. 9, aff'd 203 F. 2d 315, cert. denied 346 U. S. 832). The time of the objecting stockholders to petition to the Supreme Court for a rehearing has expired. As a consequence, the approval of the compromise has become final and the terms of the settlement agreement have become effective, including the provision in paragraph 2 thereof releasing and discharging various individuals and corporations, including the defendants in this action, from all further liability in connection with the matters which constitute the subject matter of this action.

As has already been noted, all of the stockholders, including the plaintiff in this action, were given ample notice of the proceedings in the District Court in Michigan relating to the approval of the settlement agreement. In view of that and because it is so obvious that the settlement agreement, as approved by the District Court in Michigan, constitutes a valid plea in bar in this action, it would seem to be a sufficient compliance with the requirement of Rule 23(c) as to notice if a notice of hearing in the form hereto annexed marked "Exhibit 4" should be published once in a newspaper of general circulation in the City of New York. This was the procedure followed by Judge Rifkind in *Brendle* v. *Smith*, 7 F. R. D. 119. For

that reason an order to show cause is requested providing for the publication of a notice in substantially the form submitted herewith in a newspaper of general circulation in the City of New York. Although opposition to this motion appears unlikely, deponent requests that provision be made for the service of answering affidavits five days prior to the return day so that if opposition develops, the defendants may have the opportunity to submit papers in reply.

No previous application for the relief sought herein has been requested of any other Court or Judge.

MARK F. HUGHES.

Sworn to before me this 24th day of November, 1953.

.....

AUGUSTA L. PACKER
Notary Public, State of New York
No. 24-2994000
Qualified in Kings County
Certificates filed in Kings, Queens, New York, Richmond, Bronx, Westchester Nassau and Suffolk County Clerk's Offices and in Kings, Queens, New York and Bronx County Registers' Offices
Term Expires March 30th, 1955

(NOTARIAL SEAL)

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

Order to Show Cause

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE EASTERN DISTRICT OF MICHIGAN,

SOUTHERN DIVISION.

JEROME R. PERGAMENT and GEORGE J. LONDON, suing on their own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated and in the right of and on behalf of Kaiser-Frazer Corporation,

Plaintiffs,

against

JOSEPH W. FRAZER, HENRY J. KAISER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., GRAHAM-PAIGE MOTORS CORPORATION, OTIS & CO., CYRUS EATON, THE PERMANENTE METALS CORPORATION, PERMANENTE PRODUCTS COMPANY, UNITED STATES OF AMERICA, RECONSTRUCTION FINANCE CORPORATION and KAISER-FRAZER CORPORATION,

Defendants.

Civil No. 7304.

Upon the annexed duly verified petition of Jerome R. Pergament, George J. London and Kaiser-Frazer Corporation, and upon all prior pleadings and proceedings herein, it is

ORDERED, that the parties to this action and the stockholders of the defendant Kaiser-Frazer Corporation show

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment

cause at a Term of this Court, to be held at Room 712 of the Federal Building, 231 W. Lafayette Street, in the City of Detroit, State of Michigan, on the 6th day of December, 1949, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made

(a) approving the agreement between the plaintiffs, the defendant Kaiser-Frazer Corporation, and the defendants Joseph W. Frazer, Henry J. Kaiser, Edgar F. Kaiser, Clay P. Bedford, W. A. MacDonald, Hickman Price, Jr., The Permanente Metals Coporation and Permanente Products Company, dated October 25, 1949, a copy of which is annexed to said petition marked Exhibit 1;

(b) directing that the said agreement be carried out and put into effect;

(c) fixing a date for the submission of applications for allowance of fees and expenses for plaintiffs' attorneys;

(d) providing, upon compliance with the terms of said agreement to the satisfaction of the Court, for the entry of a judgment dismissing the action, with a reservation of jurisdiction solely for the purpose of hearing and determining applications for allowances of fees and expenses for plaintiffs' attorneys and directing the payment thereof;

(e) granting such other, further and different relief as to the Court may seem just and proper;

and, sufficient reason appearing therefor, it is further

ORDERED, that service of a copy of this order to show cause and the annexed petition upon the attorneys of record of the respective defendants, whose offices are located within this District, on or before the 15th day of November, 1949, be deemed good and sufficient service upon said defendants, and it is further

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

ORDERED, that a copy of this order, of the annexed petition, of a notice of hearing in substantially the form hereto annexed marked Exhibit A, of the amended complaint and of the plaintiffs' notice of motion to amend and supplement the amended complaint, be mailed on or before the 21st day of November, 1949, by the defendant Kaiser-Frazer Corporation to each of the stockholders of said defendant of record as of the 31st day of October, 1949, and that for that purpose, the said defendant Kaiser-Frazer Corporation shall print a sufficient number of copies of this order, the annexed petition, said notice of hearing, said amended complaint and said notice of motion to amend and supplement said amended complaint, and it is further

ORDERED, that a notice substantially in the form of Exhibit A annexed to this order be published once by the defendant Kaiser-Frazer Corporation on or before the 23rd day of November, 1949; in the following newspapers of general circulation: the Detroit Legal News in the City of Detroit, Michigan, the New York Times in the City of New York, N. Y., the Chicago Daily News in the City of Chicago, Illinois, the San Francisco Chronicle in the City of San Francisco, California, and the Reno Evening Gazette in the City of Reno, Nevada, and it is further

ORDERED, that the mailing of a copy of this order, the annexed petition, said notice of hearing, said amended complaint and said notice of motion to amend and supplement said amended complaint and the publication of said notice of hearing as hereinabove prescribed shall be deemed sufficient service upon and notice to the stockholders of the defendant Kaiser-Frazer Corporation pursuant to Rule 23 (d) of the Rules of Civil Procedure.

Dated, Detroit, Michigan, November 9th, 1949.

FRANK A. PICARD
United States District Judge

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

EXHIBIT A

Notice of Hearing.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE EASTERN DISTRICT OF MICHIGAN,

SOUTHERN DIVISION.

JEROME R. PERGAMENT and GEORGE J. LONDON, suing on their own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated and in the right of and on behalf of Kaiser-Frazer Corporation, Plaintiffs, *against* JOSEPH W. FRAZER, HENRY J. KAISER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., GRAHAM-PAIGE MOTORS CORPORATION, OTIS & CO., CYRUS EATON, THE PERMANENTE METALS CORPORATION, PERMANENTE PRODUCTS COMPANY, UNITED STATES OF AMERICA, RECONSTRUCTION FINANCE CORPORATION and KAISER-FRAZER CORPORATION, Defendants.	Civil No. 7354.

To All Stockholders of the Defendant, Kaiser-Frazer Corporation:

By order of Hon. Frank A. Picard, Judge of the United States District Court for the Eastern District of Michigan, dated November 9th, 1949, a hearing will be held in said Court at Room 712 of the Federal Building, 231 W. Lafayette Street in the City of Detroit, State of Michigan,

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

on the 6th day of December, 1949, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, upon an application by the plaintiffs, Jerome R. Pergament and George J. London, and by defendant Kaiser-Frazer Corporation, for an order of said Court (a) approving the agreement between the plaintiffs, the defendant Kaiser-Frazer Corporation and the defendants Joseph W. Frazer, Henry J. Kaiser, Edgar F. Kaiser, Clay P. Bedford, W. A. MacDonald, Hickman Price, Jr., The Permanente Metals Corporation and Permanente Products Company, dated October 25th, 1949, a copy of which is annexed to said petition, marked Exhibit 1; (b) directing that the said agreement be carried out and put into effect; (c) fixing a date for the submission of applications for allowance of fees and expenses for plaintiffs' attorneys; (d) providing, upon compliance with the terms of said agreement to the satisfaction of the Court, for the entry of a judgment dismissing the action, with a reservation of jurisdiction solely for the purpose of hearing and determining applications for allowances of fees and expenses for plaintiffs' attorneys and directing the payment thereof; and (e) granting such other, further and different relief as to the Court may seem just and proper.

The aforesaid hearing may be adjourned from time to time without further notice to the parties to this action or to the stockholders of Kaiser-Frazer Corporation other than the announcement of the adjourned date at the hearing.

Dated, November 9th, 1949.

SAMUEL L. CHESS,
FISCHER & FISCHER,
PERLMAN, GOODMAN, HECHT & CHESLER,
Attorneys for Plaintiffs.

BUTZEL, EAMAN, LONG, GUST & KENNEDY,
WILLKIE OWEN FARR GALLAGHER & WALTON,
Attorneys for Defendant,
Kaiser-Frazer Corporation.

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

Petition

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION.

JEROME R. PERGAMENT and GEORGE J. LONDON, suing on their own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated and in the right of and on behalf of Kaiser-Frazer Corporation,

Plaintiffs,

against

JOSEPH W. FRAZER, HENRY J. KAISER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., GRAHAM-PAIGE MOTORS CORPORATION, OTIS & CO., CYRUS EATON, THE PERMANENTE METALS CORPORATION, PERMANENTE PRODUCTS COMPANY, UNITED STATES OF AMERICA, RECONSTRUCTION FINANCE CORPORATION and KAISER-FRAZER CORPORATION,

Defendants.

Civil No. 7354.

To the Honorable the Judges of the United States District Court for the Eastern District of Michigan:

The petition of Jerome R. Pergament and George J. London, by Samuel L. Chess and Fischer & Fischer and Perlman, Goodman, Hecht & Chesler, their attorneys, and

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

of Kaiser-Frazer Corporation, by its attorneys, Butzel, Eaman, Long, Gust & Kennedy and Willkie Owen Farr Gallagher & Walton, respectfully shows to the Court as follows:

1. That your petitioners, Jerome R. Pergament and George J. London, are the plaintiffs in the above-entitled action and that your petitioner, Kaiser-Frazer Corporation, is a defendant in said action.

2. The defendants Edgar F. Kaiser, Clay P. Bedford, W. A. MacDonald, Hickman Price, Jr. and Kaiser-Frazer Corporation have appeared and answered. That the defendants, The Permanente Metals Corporation and Permanente Products Company have not yet answered. That by a memorandum and order entered October 12, 1949, this action has been dismissed as against the defendants United States of America and Reconstruction Finance Corporation. That the defendant Otis & Co. has been served with a summons and complaint and has made a motion to dismiss the action and to quash the return of service of process, which motion is now pending undecided. That the remaining named defendants have not been served with the summons and complaint. That the defendants Joseph W. Frazer, Henry J. Kaiser, Edgar F. Kaiser, Clay P. Bedford, W. A. MacDonald and Hickman Price, Jr. are hereinafter collectively referred to as the "individual defendants."

3. That on October 22, 1949, your petitioners, Jerome R. Pergament and George J. London, as plaintiffs herein, served and filed a notice of motion to amend and supplement the amended complaint at the opening of the trial of the action so as to include alleged acts of misfeasance and neglect on the part of the individual defendants and others, not theretofore alleged in the amended complaint, resulting in loss and damage to your petitioner, the defendant Kaiser-Frazer Corporation.

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

4. That on October 25, 1949, your petitioners, Jerome R. Pergament and George J. London, as plaintiffs herein, and acting on behalf of themselves and on behalf of all other stockholders of the defendant Kaiser-Frazer Corporation, entered into a written agreement with your petitioner, the defendant Kaiser-Frazer Corporation, and with the individual defendants and the defendants The Permanente Metals Corporation and Permanente Products Company to dismiss and compromise this action and the claims set forth in the amended complaint and the aforesaid notice to amend and supplement the amended complaint upon the terms and conditions therein provided, including, among others, the condition that the compromise therein provided for shall be approved by this court in accordance with the provisions of Rule 23(c) of the Rules of Civil Procedure. Annexed hereto, marked Exhibit 1, is a true copy of said agreement; and annexed hereto, marked Exhibit 2, is a list of the metal presses and related equipment referred to in paragraph 1(d) of said agreement.

5. That, in the opinion of your petitioners, said agreement provides for a fair and reasonable disposition of the claims and matters in controversy in this action and that it is in the interest of your petitioner, the defendant Kaiser-Frazer Corporation, and of your petitioners, Jerome R. Pergament and George J. London, and of all other stockholders of the defendant Kaiser-Frazer Corporation that said agreement be approved by this Court pursuant to said Rule 23(c) and that the provisions of said agreement be carried out and put into effect.

6. That it is necessary and desirable that a hearing be held by this Court to consider said agreement and thereupon to make such order in the premises as may be just and proper, and that appropriate notice of such hearing be given to all of the parties of record and to all of the stockholders of record of the defendant Kaiser-Frazer Corporation—for all of which an order to show cause is requested.

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

7. That no previous application for the relief herein requested has been made to any other court or judge.

WHEREFORE, your petitioners pray

1. That an order be entered (a) approving the agreement, Exhibit 1 hereto annexed; (b) directing that the same be carried out and put into effect; (c) fixing a date for the submission of applications for allowance of fees and expenses for plaintiffs' attorneys; and (d) providing, upon compliance with the terms of said agreement to the satisfaction of the Court, for the entry of a judgment dismissing the action, with a reservation of jurisdiction solely for the purpose of hearing and determining applications for allowances of fees and expenses for plaintiffs' attorneys and directing the payment thereof.

2. That an order to show cause issue fixing a time and place for a hearing upon this petition, and providing for appropriate notice to all the stockholders of the defendant Kaiser-Frazer Corporation of the time, place and purpose of said hearing; and

3. That the court grant to your petitioners such other, further and different relief as to the Court may seem just and proper.

JEROME B. PERGAMENT
GEORGE J. LONDON
Plaintiffs-Petitioners.

SAMUEL L. CHESS
Samuel L. Chess,
17 John Street,
New York 7, N. Y.

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

FISCHER & FISCHER,

By KENNETH FISCHER
Member of the Firm,
2320 Guardian Building,
Detroit 26, Michigan.

PERLMAN, GOODMAN, HECHT & CHESLER,
10 South LaSalle Street,
Chicago, Illinois.
Attorneys for Plaintiffs-Petitioners.

KAISER-FRAZER CORPORATION,
By J. F. REIS
Vice-President,
Defendant-Petitioner.

BUTZEL, EAMAN, LONG, GUST & KENNEDY,

By A. HILLIARD WILLIAMS
Member of the Firm,
1881 National Bank Building,
Detroit 26, Michigan.

WILLKIE OWEN FARR GALLAGHER & WALTON
15 Broad Street,
New York 5, New York,
Attorneys for Defendant-Petitioner,
Kaiser-Frazer Corporation.

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

JEROME R. PERGAMENT, being duly sworn, deposes and says that he is one of the plaintiffs-petitioners herein; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

JEROME R. PERGAMENT

Sworn to before me this 2 }
day of November, 1949. }

ANNA K. ROSENTHAL
Notary Public.

ANNA K. ROSENTHAL
Notary Public, State of New York
Residing in Bronx Co. No. 84, Reg. No. 233-R-0
Cert. filed in N. Y. Co. No. 296, Reg. No. 241-R-0
Commission Expires March 30, 1950.

(NOTARIAL SEAL)

(County Clerk's Certificate Attached)

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

GEORGE J. LONDON, being duly sworn, deposes and says that he is one of the plaintiffs-petitioners herein; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

GEORGE J. LONDON

Sworn to before me this 3 }
day of November, 1949. }

BENJAMIN KIRSHBAUM
Notary Public.

My Commission Expires March 7, 1952

(NOTARIAL SEAL)

(County Clerk's Certificate Attached)

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

STATE OF MICHIGAN, } ss.:
COUNTY OF WAYNE, }

J. F. REIS, being sworn, deposes and says that he is Vice-President of KAISER-FRAZER CORPORATION, defendant-petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

J. F. REIS

Sworn to before me this 7th day of November, 1949.

ELIZABETH V. HAND
Notary Public, Wayne County, Michigan
My Commission Expires April 7, 1951.

(NOTARIAL SEAL)

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

EXHIBIT 1

THIS AGREEMENT made and entered into as of this 25th day of October, 1949, by and between JEROME R. PERGAMENT and GEORGE J. LONDON (hereinafter called "the plaintiffs") and JOSEPH W. FRAZER, HENRY J. KAISER, EDGAR F. KAISER, CLAY P. BEDFORD, W. A. MACDONALD and HICKMAN PRICE, JR. (hereinafter called "the individual defendants") and THE PERMANENTE METALS CORPORATION and PERMANENTE PRODUCTS COMPANY (hereinafter called "the corporate defendants") and KAISER-FRAZER CORPORATION (hereinafter called "Kaiser-Frazer").

WITNESSETH:

WHEREAS, the plaintiffs have heretofore filed and there is now pending in the United States District Court for the Eastern District of Michigan an action on their own behalf and on behalf of all other stockholders of Kaiser-Frazer similarly situated and in the right of and on behalf of Kaiser-Frazer, which action is entitled "Jerome R. Pergament and George L. London, suing on their own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated and in the right of and on behalf of Kaiser-Frazer Corporation, Plaintiffs, against Joseph W. Frazer, Henry J. Kaiser, Edgar F. Kaiser, G. G. Sherwood, E. E. Trefethen, Jr., Clay P. Bedford, W. A. MacDonald, O. B. Motter, Hickman Price, Jr., Graham-Paige Motors Corporation, Otis & Co., Cyrus Eaton, The Permanente Metals Corporation, Permanente Products Company, United States of America, Reconstruction Finance Corporation and Kaiser-Frazer Corporation, Defendants", Civil No. 7354, which action is hereinafter referred to as "the stockholders derivative action", and

WHEREAS, on or about the 22nd day of October, 1949, the plaintiffs served a notice of intention to amend and sup-

plement the amended complaint so as to include additional allegations and prayers for relief, and

WHEREAS, subject to the approval of the Court pursuant to the provisions of Rule 23(c) of the Federal Rules of Civil Procedure, the parties desire to dismiss and compromise the stockholders derivative action and to resolve all of the controversies raised by the allegations of the amended complaint and the notice of intention to amend and supplement the amended complaint and the answers thereto, together with any and all matters or claims hereinafter referred to, and

WHEREAS, the plaintiffs deem it in the best interest of Kaiser-Frazer and all of the stockholders of Kaiser-Frazer that the stockholders derivative action be dismissed and compromised upon the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the premises and of the mutual promises and agreements of the parties hereinafter set forth, the parties agree as follows:

1. The individual defendants and the corporate defendants will do or cause to be done the following:

(a) The giving of guaranties by Henry J. Kaiser Company, a Nevada corporation, and Kaiser-Industries, Inc., a Nevada corporation, to the extent in the aggregate of $15,000,000 of

(i) payment of interest on and principal of a certain loan to be obtained from Reconstruction Finance Corporation by Kaiser-Frazer in the principal amount of not to exceed $34,400,000 bearing interest at the rate of 4% per annum and repayable over a period of approximately ten years, all subject to such terms and conditions as may be agreed to between Kaiser-Frazer and Reconstruction Finance Corporation, and

(ii) the payment by Kaiser-Frazer Sales Corporation, a wholly owned subsidiary of Kaiser-Frazer, of interest on and principal of such sums as said Kaiser-Frazer Sales Corporation may from time to time borrow under a $10,000,000 revolving line of credit to be in effect for a period of approximately one year and a half, as established by Reconstruction Finance Corporation pursuant to agreement to be entered into between said Kaiser-Frazer Sales Corporation and Reconstruction Finance Corporation,

such guaranties to be upon such terms as may be agreed to between said Henry J. Kaiser Company and Kaiser Industries, Inc. and Reconstruction Finance Corporation.

(b) The pledging by said Henry J. Kaiser Company and Kaiser Industries, Inc. of collateral having a sound value in the opinion of the Board of Directors of said Reconstruction Finance Corporation, of not less than $10,000,000 to secure the performance of the guaranties referred to in sub-paragraph (a) of this paragraph 1, all as may be agreed to between said Henry J. Kaiser Company and Kaiser Industries, Inc. and Reconstruction Finance Corporation.

(c) The payment to Kaiser-Frazer of the sum of $500,000.

(d) The purchase from Kaiser-Frazer by Kaiser Metal Products, Inc. of certain metal presses and related equipment located in the plant of Kaiser Metal Products, Inc. at Bristol, Pa., for an amount equal to the value of such presses as shown on the books and records of Kaiser-Frazer as of September 30, 1949, to wit, the sum of $879,503.30.

2. Subject only to the provisions of paragraph 7 hereof, Kaiser-Frazer and the plaintiffs on their own

behalf and on behalf of all other stockholders of Kaiser-Frazer similarly situated and in the right of and on behalf of Kaiser-Frazer and in their own right hereby agree to release and discharge and hereby do release and forever discharge the individual defendants, the corporate defendants and G. G. Sherwood, E. E. Trefethen, Jr., H. C. McCaslin, O. B. Motter, Walston S. Brown, Theodore V. Houser, J. F. Reis, Michael Miller, R. H. Hetrick, T. M. Price, Henry J. Kaiser, Jr., Graham-Paige Motors Corporation, a Michigan corporation, Kaiser Steel Corporation (formerly known as Kaiser Company, Inc.), a Nevada corporation, Kaiser Metal Products, Inc. (formerly known as Kaiser Fleetwings, Inc. and Kaiser Cargo, Inc.), a California corporation, Henry J. Kaiser Company, a Nevada corporation, Kaiser Industries, Inc. (formerly known as Kaiser Engineers, Inc.), a Nevada corporation, Kaiser Services, a California corporation, Underwriters Service, Inc., a California corporation, their heirs, executors, administrators, successors and assigns; as well as their officers, agents and employees of all and from all, and all manner of action and actions, cause and causes of actions, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever in law or in equity, which against said individual defendants, corporate defendants and G. G. Sherwood, E. E. Trefethen, Jr., H. C. McCaslin, O. B. Motter, Walston S. Brown, Theodore V. Houser, J. F. Reis, Michael Miller, R. H. Hetrick, T. M. Price, Henry J. Kaiser, Jr., Graham-Paige Motors Corporation, a Michigan corporation, Kaiser Steel Corporation (formerly known as Kaiser Company, Inc.), a Nevada corporation, Kaiser Metal Products, Inc.

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

(formerly known as Kaiser Fleetwings, Inc. and Kaiser Cargo, Inc.), a California corporation, Henry J. Kaiser Company, a Nevada corporation, Kaiser Industries, Inc. (formerly known as Kaiser Engineers, Inc.), a Nevada corporation, Kaiser Services, a California corporation, Underwriters Service, Inc., a California corporation, their heirs, executors, administrators, successors and assigns, as well as their officers, agents and employees, said Kaiser-Frazer and the plaintiffs on their own behalf and on behalf of all other stockholders of Kaiser-Frazer similarly situated and in the right of and on behalf of Kaiser-Frazer and in their own right, ever had, now have or which they or their heirs, executors, administrators, successors and assigns, hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the date of these presents, including without limitation of the generality of the foregoing any and all claims, charges and allegations set forth in the amended complaint and the notice to amend and supplement the amended complaint including

(a) The purchase or authorization of the purchase by Kaiser-Frazer Corporation on or about February 3, 1948 of 186,200 shares of the common stock of Kaiser-Frazer.

(b) All acts and transactions relating to or in connection with a proposed offering of common stock of Kaiser-Frazer, a Registration Statement covering which was made effective by the Securities and Exchange Commission on February 3, 1948.

(c) The making of certain contracts dated September 20, 1946, December 1, 1947 and December 12, 1947 between Kaiser-Frazer and Graham-Paige Motors Corporation, including all agreements supplementary and amendatory thereof and all acts and

transactions under or in connection therewith, and in addition each and every transaction between Graham-Paige Motors Corporation and Kaiser-Frazer and payments made on account thereof.

(d) The following transactions of The Permanente Metals Corporation:

(i) The assignment by Kaiser-Frazer Corporation to The Permanente Metals Corporation of a certain letter of intent dated March 27, 1946 covering the proposed lease of Plancors Nos. 524 and 1061 from War Assets Administration to Kaiser-Frazer, and the subsequent lease and purchase of said Plancors Nos. 524 and 1061 by The Permanente Metals Corporation.

(ii) The procurement by Kaiser Metal Products, Inc. of a letter of intent with reference to a certain aluminum reduction plant at Head, Washington, the subsequent assignment of said letter of intent to The Permanente Metals Corporation, and the subsequent lease and acquisition of said plant by The Permanente Metals Corporation.

(iii) The procurement by The Permanente Metals Corporation of a letter of intent with reference to a certain alumina plant at Baton Rouge, Louisiana, and the subsequent lease and acquisition of said plant by The Permanente Metals Corporation.

(iv) The procurement by The Permanente Metals Corporation of a letter of intent to purchase an aluminum fabricating plant at Newark, Ohio, and the subsequent purchase thereof by The Permente Metals Corporation.

(v) All other transactions between Kaiser-Frazer and The Permanente Metals Corporation,

including, without limitation of the generality of the foregoing, purchases of aluminum by Kaiser-Frazer from The Permanente Metals Corporation; and all acts and transactions in anywise connected therewith of the individual defendants, the corporate defendants and the other persons and corporations hereinabove in this paragraph 2 mentioned.

(e) All transactions whereunder Kaiser-Frazer leased a certain plant located at Long Beach, California from War Assets Administration, operated such plant, paid rentals thereon, maintained the same and manufactured farm equipment therein for Graham-Paige Motors Corporation, and all acts and transactions in anywise connected therewith of the individual defendants, the corporate defendants and the other persons and corporations hereinabove in this paragraph 2 mentioned.

(f) All transactions between Kaiser-Frazer and Kaiser Metal Products, Inc., including, without limitation of the generality of the foregoing, transactions whereby Kaiser-Frazer paid the cost of experimental work incurred by Kaiser Metal Products, Inc., paid the cost of equipment acquired and installed in the plant of said Kaiser Metal Products, Inc., released an option to buy the plant of Kaiser Metal Products, Inc. at Bristol, Pa., permitted to remain in said plant certain equipment owned by Kaiser-Frazer and purchased, at prices claimed to have been excessive, automotive parts from Kaiser Metal Products, Inc., and all acts and transactions in anywise connected therewith of the individual defendants, corporate defendants and the other persons and corporations hereinabove in this paragraph 2 mentioned.

(g) All transactions between Kaiser-Frazer and Kaiser Steel Corporation, including, without limita-

tion of the generality of the foregoing, transactions whereby Kaiser-Frazer purchased certain steel products from Kaiser Steel Corporation and entered into and maintained in effect a management contract for the operation of a certain blast furnace at Provo, Utah, and all acts and transactions in anywise connected therewith of the individual defendants, the corporate defendants and the other persons or corporations hereinabove in this paragraph 2 mentioned.

(h) All transactions between Kaiser-Frazer and Kaiser Industries, Inc., including, without limitation of the generality of the foregoing, transactions whereunder Kaiser-Frazer obtained engineering services from Kaiser Industries, Inc., and all acts and transactions in anywise connected therewith of the individual defendants, the corporate defendants and other persons or corporations hereinabove in this paragraph 2 mentioned.

(i) The transaction whereunder Kaiser-Frazer on or about December 27, 1947 repaid in full the outstanding principal amount of a loan made to Kaiser-Frazer by Bank of America, National Trust and Savings Association, including all acts and transactions in anywise connected therewith of the individual defendants, the corporate defendants, and the other persons or corporations hereinabove in this paragraph 2 mentioned.

3. Nothing contained in this agreement shall in anywise release or discharge Otis & Co. or any officer, director or stockholder of Otis & Co. from any claim Kaiser-Frazer may have against any one or more of them, including, without limitation of the generality of the foregoing, the action instituted by Kaiser-Frazer against Otis & Co. in the United States District Court

for the Southern District of New York entitled "Kaiser-Frazer Corporation, plaintiff, against Otis & Co., defendant", Civil Action No. 45-564, and a certain counterclaim and third party complaint against James F. Masterson, Otis & Co., Cyrus S. Eaton, et al., in an action entitled "James F. Masterson, plaintiff, against Kaiser-Frazer Corporation, et al., defendants" now pending in the United States District Court for the Eastern District of Michigan, Southern Division, Civil Action No. 7365. The plaintiffs recognize and agree that Kaiser-Frazer shall prosecute or otherwise dispose of such claims as in the discretion of its Board of Directors is deemed advisable.

4. Nothing contained in this agreement shall in anywise discharge or release Graham-Paige Motors Corporation from or in respect of the claim or claims asserted against said Graham-Paige Motors Corporation in an action entitled "Michael Stella against Graham-Paige Motors Corporation and Kaiser-Frazer Corporation" pending in the United States District Court for the Southern District of New York, Civil Action No. 51-92 and in the action entitled "Michael Stella, plaintiff, against Graham-Paige Motors Corporation and Kaiser-Frazer Corporation, defendants" pending in the United States District Court for the Eastern District of Michigan, Civil Action No. 8344.

5. In entering into this agreement, the individual defendants and the corporate defendants do not admit or concede the truth of or liability for any of the allegations, matters or things set forth or referred to in the amended complaint and the notice to amend and supplement the amended complaint in the stockholders derivative action or any of the matters and things referred to herein. In the event that this agreement and the compromise and settlement herein agreed to shall not

be approved pursuant to Rule 23(c) of the Rules of Civil Procedure as more fully provided in paragraph 7 hereof; this agreement shall not be offered in evidence or otherwise used by or against any of the parties hereto for any purpose whatever.

6. As soon after the execution of this agreement as is feasible, the plaintiffs and Kaiser-Frazer will make an appropriate application to the District Court of the United States for the Eastern District of Michigan, Southern Division, for an order pursuant to Rule 23(c) of the Rules of Civil Procedure approving this agreement and providing for the dismissal and compromise of the derivative stockholders action in accordance with its terms.

7. This agreement is subject to the approval of the District Court of the United States for the Eastern District of Michigan, Southern Division, pursuant to the provisions of said Rule 23(c). If for any reason the court should fail to make an order approving this agreement and dismissing and compromising the stockholders derivative action in accordance with its terms, this agreement and all of the terms and conditions hereof shall be null and void and of no force and effect whatsoever and none of the parties hereto shall be bound or prejudiced thereby.

8. The parties agree that they shall execute any further agreements and writings and perform any and all acts necessary or proper to carry out the purpose and intentions of this agreement.

9. This agreement may be executed in any number of counterparts, any one of which when executed by any of the parties hereto shall be deemed an original

for all purposes. If any of the individual defendants or corporate defendants should fail to enter into this agreement, it shall nevertheless be effective as to all of the parties signatory hereto; and, in such event, any such individual defendant or corporate defendant shall be entitled to the benefits of paragraph 2 hereof.

IN WITNESS WHEREOF, the individual parties have hereunto set their hands and seals and the corporate defendants and Kaiser-Frazer Corporation have caused these presents to be executed by their duly authorized officers as of the day and year first above written.

JEROME R. PERGAMENT (L. S.)

Jerome R. Pergament

GEORGE J. LONDON (L. S.)

George J. London

On their own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated

JOSEPH W. FRAZER (L. S.)

Joseph W. Frazer

HENRY J. KAISER (L. S.)

Henry J. Kaiser

EDGAR F. KAISER (L. S.)

Edgar F. Kaiser

CLAY P. BEDFORD (L. S.)

Clay P. Bedford

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

W. A. MacDonald (L. S.)

W. A. MacDonald

Hickman Price, Jr. (L. S.)

Hickman Price, Jr.

The Permanente Metals Corporation

By E. E. Trefethen, Jr.

Vice-President

Permanente Products Company

By E. E. Trefethen, Jr.

Vice-President

Kaiser-Frazer Corporation

By J. F. Reis

Vice-President

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

EXHIBIT 2

Complete List of Presses and Equipment Referred to in Paragraph 1(d) of Agreement dated October 25, 1949 between Jerome R. Pergament, George J. London, Joseph W. Frazer, Henry J. Kaiser, Edgar F. Kaiser, Clay P. Bedford, W. A. MacDonald, Hickman Price, Jr., The Permanente Metals Corporation, Permanente Products Company and Kaiser-Frazer Corporation.

Quantity	Description	Manufacturer	Kaiser Frazer Ser. No.	Kaiser Fleetwings Inc. Ser. No.
1	Type F-4400-108 Press	Clearing Mach. Corp.	11345	50000
1	Type F-4400-108 Press	Clearing Mach. Corp.	11344	50001
1	Type F-4400-108 Press	Clearing Mach. Corp.	11342	50002
1	Type F-4400-108 Press	Clearing Mach. Corp.	11343	50003
1	Type F-4400-108 Press	Clearing Mach. Corp.	11346	50004
1	Type F-4400-108 Press	Clearing Mach. Corp.	11320	50005
1	Type F-4400-108 Press	Clearing Mach. Corp.	11319	50006
1	Type SD-2160-48 Press	Clearing Mach. Corp.	11376	50007
1	Type SD-2160-48 Press	Clearing Mach. Corp.	11375	50008
1	Type SD-2160-48 Press	Clearing Mach. Corp.	11374	50009
1	Type SD-2160-48 Press	Clearing Mach. Corp.	11373	50010
1	Type ET-380-108 Press	E. W. Bliss Co.	11379	50015
1	Type ET-380-108 Press	E. W. Bliss Co.	11378	50016

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

Quantity	Description	Manufacturer	Kaiser Frazer Ser. No.	Kaiser Fleetwings Inc. Ser. No.
1	Type 2E-180-72 Press	E. W. Bliss Co.	11384	50017
1	Type 2ET-200-72 Press	E. W. Bliss Co.	11386	50018
1	Type 2ET-200-72 Press	E. W. Bliss Co.	11387	50019
1	Type 2ET-200-72 Press	E. W. Bliss Co.	11388	50020
1	Type 23-M Inclinable Press	E. W. Bliss Co.	11389	50021
1	Type 23-M Inclinable Press	E. W. Bliss Co.	11393	50022
1	Type 23-M Inclinable Press	E. W. Bliss Co.	11394	50023
1	Type 23-M Inclinable Press	E. W. Bliss Co.	11391	50024
1	Type 23-M Inclinable Press	E. W. Bliss Co.	11392	50025
1	Type 23-M Inclinable Press with (Air Cushion)	E. W. Bliss Co.	11400	50026
1	Type 23-M Inclinable Press with (Air Cushion)	E. W. Bliss Co.	11399	50027
1	Type 23-M Inclinable Press with (Air Cushion)	E. W. Bliss Co.	11397	50028
1	Type 23-M Inclinable Press with (Air Cushion)	E. W. Bliss Co.	11398	50029
1	Type 23-M Inclinable Press with (Air Cushion)	E. W. Bliss Co.	11395	50030
1	Type 23-M Inclinable Press with (Air Cushion)	E. W. Bliss Co.	11396	50031

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

Quantity	Description	Manufacturer	Kaiser Frazer Ser. No.	Kaiser Fleetwings Inc. No.
1	Type 23-M Inclinable Press	E. W. Bliss Co.	11390	50032
1	Type DF-1480-48 Press	Clearing Mach. Corp.	11479	50033
	Scrap Boxes	Unknown		50034
1	Platform Scale	Yale & Towne	350378	50035
1	Alligator Shear	Doelger & Kirsten	Unknown	50037
1	Scrap Conveyor & Belt	Industrial Eng. Co.	350350	50038
1	Towmotor Ford	Ford Motor Co.	Unknown	50039
1	5-Ton Crane	Harmschteger Co.	Unknown	50040
1	10-Ton Crane	Whiting Corp.	Unknown	50041
1	15-Ton Crane	Whiting Corp.	350075	50042
840'	Overhead Conveyor #1	Jarvis B. Webb Co.	350058	50043
1084'	Overhead Conveyor #2	Jarvis B. Webb Co.	350057	50044
1	Washer & Dryer	Schmeig Industries	350336 350344	50052 50053
1	Niagara Shear	Niagara Co.	350002	50054
1	Testing Machine	Tinus Olsen Mach. Co.	350022	50055
1	Carrier Lift Truck	Ross Carrier Co.	350327	50056
1	Air Compressor	Worthington Co.	350352	50057
1	Transformer	Larkin Lectos Products		
1	Transformer	Larkin Lectos Products		
1	Transformer	Larkin Lectos Products		

Amended Complaint.

IN THE

DISTRICT COURT OF THE UNITED STATES.

FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION.

JEROME R. PERGAMENT and GEORGE J. LONDON, suing on their own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated and in the right of and on behalf of Kaiser-Frazer Corporation,

Plaintiffs,

against

JOSEPH W. FRAZER, HENRY J. KAISER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., GRAHAM-PAIGE MOTORS CORPORATION, OTIS & CO., CYRUS EATON, THE PERMANENTE METALS CORPORATION, PERMANENTE PRODUCTS COMPANY, UNITED STATES OF AMERICA, RECONSTRUCTION FINANCE CORPORATION and KAISER-FRAZER CORPORATION,

Defendants.

Civil No. 7354.

Plaintiffs suing on their own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated and in the right of and on behalf of Kaiser-Frazer Corporation, by their attorneys, Samuel L. Chess and Fischer & Fischer, and Perlman, Goodman, Hecht & Ches-

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

ler, for their amended complaint herein respectfully show and allege upon information and belief, except as to paragraph "1", which is alleged on personal knowledge:

For a first cause of action against defendants Joseph W. Frazer, Henry J. Kaiser, Edgar F. Kaiser, G. G. Sherwood, E. E. Trefethen, Jr., Clay B. Bedford, W. A. MacDonald, O. B. Motter, Hickman Price, Jr., Graham-Paige Motors Corporation and Kaiser-Frazer Corporation:

1. Plaintiffs are stockholders of Kaiser-Frazer corporation. Plaintiff Jerome R. Pergament, a resident of the County, City and State of New York, has been such stockholder continuously since December, 1947. Plaintiff George J. London, a resident of Jersey City, New Jersey, has been such stockholder continuously since October, 1945.

2. Defendant Kaiser-Frazer Corporation* is and at all times hereinafter mentioned was a corporation** duly organized and existing under and by virtue of the laws of the State of Nevada. It was organized on or about August 9, 1945. Since that time it has engaged and does now engage in the production, distribution and sale of passenger automobiles and replacement parts thereof and has engaged and does now engage in said business directly and through wholly owned subsidiaries at Willow Run, Detroit and Dowagiac, in the State of Michigan, and in the County, City and State of New York.

3. Defendant Graham-Paige Motors Corporation† is and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the

* Hereinafter referred to as "Kaiser-Frazer".

** Attached are further amendments pursuant to Court order dated December 20, 1948, and filed January 12, 1949.

† Hereinafter referred to as "Graham-Paige".

laws of the State of Michigan. At the present time it is engaged in the manufacture, distribution and sale of farm equipment. At the times mentioned herein and until in or about the month of February, 1947 it was also engaged in the manufacture, distribution and sale of automobiles. At all times mentioned herein it had and now has offices for the transaction of its business in the City of Detroit, Michigan, and in the County, City and State of New York.

4. Defendants Joseph W. Frazer, Edgar F. Kaiser, Clay P. Bedford, W. A. MacDonald, O. B. Motter and Hickman Price, Jr. reside in the City of Willow Run, State of Michigan. Defendants Henry J. Kaiser, G. G. Sherwood and E. E. Trefethen, Jr. reside in the City of Oakland, State of California.

5. The principal plant of defendant Kaiser-Frazer located at Willow Run, Michigan, was leased from the Reconstruction Finance Corporation under a lease dated November 1, 1945. From about that date until the month of February, 1947 said plant was operated by defendant Kaiser-Fraser and defendant Graham-Paige pursuant to a joint operating agreement entered into on September 20, 1945 and thereafter supplemented and amended, under which agreement said defendants had the right to use the productive capacity and facilities of the plant for the manufacture and production of automobiles in the following proportions: Kaiser-Frazer had the right to use up to 66⅔% of the productive capacity and facilities and Graham-Paige had the right to use up to 33⅓% of the productive capacity and facilities. The two corporations generally adhered to such percentage and defendant Kaiser-Frazer and defendant Graham-Paige had borne respectively approximately two-thirds and one-third of the total cost of operations at said Willow Run plant.

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

6. In or about October, 1946 forecasts made on behalf of Graham-Paige showed that it would not be able to continue to finance the utilization of one-third of the productive capacity at the Willow Run plant unless it were to secure a minimum of $5,000,000 additional financing. Graham-Paige endeavored to secure such financing, but was unable to do so. Accordingly, as of December 1, 1946 it made an agreement with defendant Kaiser-Frazer under which the latter was to manufacture at the Willow Run plant automobiles on behalf of Graham-Paige, and under which it was agreed that after February 1, 1947 the productive capacity and facilities of the Willow Run plant only up to 12½% was to be utilized in connection with the production of automobiles for Graham-Paige. Said agreement was described as an Interim Agreement.

7. Thereafter and as of December 12, 1946 a further agreement was made between defendants Kaiser-Frazer and Graham-Paige, which provided in substance that Graham-Paige would sell and transfer to Kaiser-Frazer its automotive assets—principally tooling and equipment at the Willow Run plant—which, together with a cash payment of $3,000,000, was "estimated" as having a value of approximately $10,600,000, and that in exchange therefor Kaiser-Frazer should undertake to pay the principal of, interest on and expenses incidental to 4% Convertible Debentures due April 1, 1956 of Graham-Paige in the principal amount of $8,524,000; to issue to Graham-Paige 750,000 shares of Kaiser-Frazer common stock; and to assume all the liabilities of Graham-Paige and its subsidiaries which arose out of the automobile business of Graham-Paige at Willow Run. For the purpose of said transaction, which was consummated under date of February 10, 1947, defendant Kaiser-Frazer valued the aforesaid 750,000 shares at $6.50 per share and at said valuation computed that it was paying approximately $2,715,000 in excess of the fair value of the

assets received from Graham-Paige, which said excess it allocated to so-called "intangible rights" which were allegedly being acquired from said Graham-Paige, including Graham-Paige's purported right to one-third of the production capacity of the Willow Run plant.

8. In truth and in fact the value of the aforesaid so-called "intangible rights" acquired from Graham-Paige were non-existent or negligible. Under the prior Interim Agreement dated as of December 1, 1946, referred to hereinabove, Graham-Paige's rights in and to the production capacity of the Willow Run plant had been reduced to 12½% thereof, and said Interim Agreement and the aforesaid agreement dated as of December 12, 1946 were made for the purpose, in part, of limiting and then eliminating the losses which Graham-Paige had continuously sustained through its operations at the said Willow Run plant. Moreover, when the aforesaid agreement of December 12, 1946 was made the Kaiser-Frazer stock had a market value of $8.12½ per share and a book value of approximately $10 per share and the real, true and intrinsic value of the aforesaid 750,000 shares of Kaiser-Frazer stock issued by defendant Kaiser-Frazer to defendant Graham-Paige was approximately $2,500,000 in excess of the value assigned to said stock by Kaiser-Frazer for the purposes of the transaction. In addition, by undertaking to pay not only the principal of the aforesaid Graham-Paige Convertible Debentures, but also the interest thereon and the incidental expenses in connection therewith, defendant Kaiser-Frazer was undertaking additional obligations running into millions of dollars. The payments made and obligations assumed by defendant Kaiser-Frazer in connection with the aforesaid transaction, accordingly, were not merely $2,715,000 in excess of the "estimated" value of the assets received from Graham-Paige but were in the neighborhood of from $6,000,000 to $8,000,000 in excess thereof.

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

9. The purpose, object and effect of the aforesaid transaction was not alone to cause defendant Kaiser-Frazer to pay an exorbitant sum for the assets acquired from Graham-Paige, but was to enable said defendant Graham-Paige and also defendants Joseph W. Frazer and Henry J. Kaiser to profit therefrom and at the same time to assure the continuance of the control exercised by said defendants over the affairs of defendant Kaiser-Frazer. Defendant Joseph W. Frazer had and has a substantial stock interest in Graham-Paige. As the result of the aforesaid transaction and the issuance to Graham-Paige of the aforesaid 750,000 shares, Graham-Paige increased its holdings from 250,000 shares to 1,000,000 shares of Kaiser-Frazer stock, then constituting 21.05% of the outstanding stock of Kaiser-Frazer. Thereafter and in or about August of 1947 defendant Graham-Paige sold 100,000 shares of its Kaiser-Frazer stock to The Permanente Metals Corporation of which defendant Henry J. Kaiser is an officer, director and substantial stockholder at a price of $6.75 per share. Approximately 570,000 shares of Kaiser-Frazer stock owned by Graham-Paige remained in a voting trust, made on or about February 10, 1947, which gives to Joseph W. Frazer and Henry J. Kaiser, the voting trustees, control thereof. The disposition of the Kaiser-Frazer stock issued to Graham-Paige pursuant to the aforesaid transaction, as aforesaid, and the objects to be accomplished thereby, as herein alleged, were in contemplation of the parties at the time of the aforesaid transaction between Kaiser-Frazer and Graham-Paige.

10. At the time of the aforesaid transaction between defendants Kaiser-Frazer and Graham-Paige the following defendants were and still are directors and officers of Kaiser-Frazer: Joseph W. Frazer, Henry J. Kaiser, Edgar F. Kaiser, G. G. Sherwood, E. E. Trefethen, Jr., Clay P. Bedford, W. A. MacDonald, O. B. Motter and Hickman Price, Jr. Moreover, at the time of said transaction a majority of said directors, namely, Joseph W. Frazer,

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Edgar F. Kaiser, Clay P. Bedford, W. A. MacDonald, O. B. Motter and Hickman Price, Jr., were also directors and/or officers of Graham-Paige. Defendant Joseph W. Frazer was at said time and still is President of Kaiser-Frazer and also President and Chairman of the Board of Graham-Paige. All said defendants authorized and approved the aforesaid transaction between Kaiser-Frazer and Graham-Paige and in so doing acted negligently, wrongfully and fraudulently and in violation of their fiduciary duties to Kaiser-Frazer and to its damage in sums running into many millions of dollars; as aforesaid, and to and for the benefit of defendants Graham-Paige, Joseph W. Frazer and Henry J. Kaiser and all said defendants, including defendant Graham-Paige, acted in wrongful and fraudulent concert and conspiracy to effect said transaction with and for the purpose of enriching defendants Graham-Paige, Joseph W. Frazer and Henry J. Kaiser at the expense of defendant Kaiser-Frazer, and the aforesaid transaction has had that effect.

11. Plaintiffs have made no demand upon defendant Kaiser-Frazer or upon its officers or directors to institute an action on behalf of Kaiser-Frazer for the relief sought herein because the said officers and directors of Kaiser-Frazer are responsible for the aforesaid transaction between defendant Kaiser-Frazer and defendant Graham-Paige and are liable therefor to defendant Kaiser-Frazer. They were parties to the plan and conspiracy to benefit and enrich defendants Graham-Paige, Joseph W. Frazer and Henry J. Kaiser at the expense of defendant Kaiser-Frazer; they (except for one Walston S. Brown) are defendants herein; and any such demand, as aforesaid, would in the circumstances be useless and futile.

12. This action is not a collusive one conferring upon a court of the United States jurisdiction of an action of which it would not otherwise have jurisdiction.

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

13. Exclusive of interest and costs the matter in controversy in this action exceeds the sum of $3,000.

14. Plaintiffs have no adequate remedy at law.

For a Second Cause of Action against defendants Joseph W. Frazer, Henry J. Kaiser, G. G. Sherwood, E. E. Trefethen, Jr., Clay P. Bedford, W. A. MacDonald, O. B. Motter, Hickman Price, Jr., Otis & Co., Cyrus Eaton and Kaiser-Frazer Corporation:

15. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs "1" and "2" hereinabove as though herein set forth at length.

16. Plaintiffs repeat and reallege each and every allegation set forth in paragraph "4" hereinabove as though herein set forth at length and further allege that defendant Cyrus Eaton resides in the City of Northfield, State of Ohio.

17. Defendant Otis & Co. is and at all the times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and at such times had and still has offices for the transaction of business in the County, City and State of New York and in the City of Detroit, Michigan. Defendant Cyrus Eaton is and at all times hereinafter mentioned was a director, officer and one of the principal stockholders of said defendant Otis & Co.

18. Prior to February 3, 1948 defendant Kaiser-Frazer contemplated a public issue of 1,500,000 shares of the common stock of said Kaiser-Frazer at a price to the public of $13 per share, and in that connection arrangements had been made with defendant Otis & Co. and with

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First California Company and Allen & Company as underwriters under which said underwriters were to acquire such shares under a firm commitment at a price to yield to defendant Kaiser-Frazer $11.50 per share and to yield to said underwriters, when and if they disposed of said stock, underwriting discounts and commissions in the amount of $1.50 per share. It was contemplated by the parties that the stock would be offered to the public on February 4, 1948 and that the underwriting agreement would be signed prior thereto.

19. On or prior to February 2, 1948 defendants Otis & Co. and Cyrus Eaton advised the officers and directors of Kaiser-Frazer that the proposed underwriting agreement would be executed by the underwriters if and only if defendant Kaiser-Frazer undertook during the day of February 3, 1948 to "stabilize" the market in the stock of Kaiser-Frazer at $13.50 per share, and advised the officers and directors of Kaiser-Frazer that such "stabilization" operations would involve the acquisition by Kaiser-Frazer of no more than 25,000 shares of its stock on the market. Said defendants, moreover, undertook to conduct said stabilization operations on behalf of defendant Kaiser-Frazer. Arrangements were made, accordingly, that such "stabilization" operations be conducted on February 3 through the acquisition by defendant Kaiser-Frazer of its own stock on the market so as to maintain a market price of $13.50 per share, and that such operations be conducted by defendants Eaton and Otis & Co. on behalf of defendant Kaiser-Frazer.

20. During the course of the following day, namely, February 3, 1948, said "stabilization" operations were conducted as per the aforesaid arrangements, but it soon became apparent that such operations would necessitate the acquisition by defendant Kaiser-Frazer of increasingly

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larger numbers of its own shares on the market and, accordingly, defendants Eaton and Otis & Co. advised the acquisition of increasingly large numbers of shares and obtained the authorization from the officers and directors of Kaiser-Frazer to acquire such shares on behalf of defendant Kaiser-Frazer. By the end of said day, namely, February 3, 1948, there had been acquired in pursuance of said "stabilization" operations by and on behalf of defendant Kaiser-Frazer a total of 186,200 shares of the stock of defendant Kaiser-Frazer at a cost to defendant Kaiser-Frazer in the neighborhood of $2,500,000.

21. Said "stabilization" operations were in truth and in fact conducted for the purpose of inducing the purchase by the public of the stock proposed to be offered by defendant Kaiser-Frazer, were for the purpose and had the effect of creating an artificial market in the stock of said defendant Kaiser-Frazer, and were conducted in such manner and by such means as to peg or rig the price of said stock on the national securities exchanges, the facilities of which were used by the public for the sale and acquisition of said stock and were conducted in such manner as to violate various provisions of Sections 9, 10 and 17 of the Securities Exchange Act of 1934 and the rules promulgated in pursuance thereof. Moreover, defendants in causing defendant Kaiser-Frazer to make such substantial acquisitions of its own stock on the market for the purposes and with the effect aforesaid, knew or should have known that their conduct was improper and unlawful and that they were jeopardizing the interests of defendant Kaiser-Frazer, particularly inasmuch as the stock thus acquired was worth substantially less than the price paid therefor.

22. On said date, namely, February 3, 1948, defendants Eaton and Otis & Co., anticipating difficulty in the disposition of the 1,500,000 shares of stock which it had been arranged that the underwriters were to acquire from

defendant Kaiser-Frazer for sale to the public, and believing that their conduct as herein set forth might facilitate the disposition of such stock, wrongfully and fraudulently notified many persons, firms and corporations of the aforesaid "stabilization" operations being conducted on behalf of defendant Kaiser-Frazer, and advised and counseled them then and there and on that day to dispose of such stock of Kaiser-Frazer as they had on the market which was being pegged at $13.50 per share, and advised and counseled them that on the following day, when the underwriters offered the stock to the public, they would be able to acquire such stock at $13.00 per share and thereby make a profit for themselves. Such wrongful, fraudulent and clandestine advice and counsel to such persons, firms and corporations accounted for the great activity in the market of the stock of defendant Kaiser-Frazer, and accounted for the necessity on the part of Kaiser-Frazer to acquire such large block of stock, as aforesaid, in its "stabilization" operations.

23. Thereafter, on February 3, 1948, and after the close of the market, defendants Eaton and Otis & Co. advised the officers and directors of defendant Kaiser-Frazer that the underwriters were unwilling to sign the agreement calling for their acquisition of 1,500,000 shares of the stock of Kaiser-Frazer and, accordingly, arrangements were then made to modify said agreement so as to require said underwriters to acquire 900,000 shares of stock under a firm commitment giving them the option to acquire the additional 600,000 shares of stock under what was described as a "best efforts" deal, i.e., that they were to use their best efforts to dispose of the additional 600,000 shares of stock, but if they were unable to do so they would not be required to acquire same. Said agreement as so modified was thereupon and on said day, namely, February 3, 1948, signed by the Underwriters and by defendant Kaiser-Frazer. In

truth and in fact the said underwriters, including the defendant Otis & Co., were at that time, and by reason of the circumstances hereinabove related, estopped both in fact and in law from refusing to sign the original agreement calling for their acquisition of 1,500,000 shares of the common stock of defendant Kaiser-Frazer, and in making the aforesaid compromise arrangement the officers and directors of defendant Kaiser-Frazer acted negligently and in disregard of the best interests of defendant Kaiser-Frazer but under duress practiced upon them by defendants Eaton and Otis & Co.

24. On the following day, namely, February 4, 1948, and on the days following that date, the underwriters, particularly Otis & Co., found it impossible to dispose of the shares which they had agreed to acquire from defendant Kaiser-Frazer, and said defendant Otis & Co. importuned the officers and directors of defendant Kaiser-Frazer to relieve the underwriters of their commitments, but the directors and officers of Kaiser-Frazer were unwilling to do so. The underwriting agreement, which provided for the closing on February 9, 1948, provided also in substance that on or prior to the closing an opinion should be received from counsel for Kaiser-Frazer in form and substance satisfactory to counsel for Otis & Co., to the effect that except as set forth in the prospectus filed with the Securities and Exchange Commission covering the shares to be sold by the underwriters, there was not to the knowledge of counsel any material pending legal proceedings required to be set forth in the prospectus to which Kaiser-Frazer was a party and that no such proceedings were contemplated. In an effort to relieve itself of its underwriting commitment said defendant Otis & Co., wrongfully and fraudulently caused to be instituted in the Circuit Court for the County of Wayne, State of Michigan, in Chancery, an action entitled "James F. Masterson, Plaintiff, *vs.* Kaiser-Frazer Cor-

poration, *et al.*, Defendants", the complaint in said action being filed on the morning of February 9, 1948. Defendant Otis & Co., using the filing of said complaint as a pretext, refused to consummate the underwriting agreement and induced one of its co-underwriters, namely, First California Company, similarly to refuse to consummate said underwriting agreement.

25. At the times hereinabove mentioned the following defendants were directors and officers of defendant Kaiser-Frazer: Joseph W. Frazer, Henry J. Kaiser, Edgar F. Kaiser, G. G. Sherwood, E. E. Trefethen, Jr., Clay P. Bedford, W. A. MacDonald, O. B. Motter, and Hickman Price, Jr. Said defendants and one Walston S. Brown were the officers and directors acting for and on behalf of defendant Kaiser-Frazer in the aforesaid transactions.

26. In the aforesaid transactions the directors and officers of defendant Kaiser-Frazer, all of whom except for Walston S. Brown are defendants herein, acted negligently, wrongfully and unlawfully in that they caused Kaiser-Frazer to embark upon the so-called "stabilization" operations which were in fact in violation of the Securities Exchange Act of 1934, and in causing said defendant Kaiser-Frazer to acquire its own stock not only at a price far in excess of the value thereof, but at a time when it could ill afford the loss of the use in its business operations of the $2,500,000 which said acquisition entailed; in that they undertook such "stabilization" operations in advance of a written agreement with the underwriters committing them to the purchase from defendant Kaiser-Frazer of 1,500,000 shares of stock upon the terms as arranged; and in that they permitted themselves to be induced to modify said underwriting arrangement after the conduct of said so-called "stabilization" operations, as aforesaid. In the aforesaid transactions the defendants Eaton and Otis & Co.

acted wrongfully, unlawfully and fraudulently in that they induced defendant Kaiser-Frazer to conduct the aforesaid unlawful so-called "stabilization" operations, and actually conducted said operations on behalf of said defendant Kaiser-Frazer; in that while said so-called "stabilization" operations were being conducted they advised and counseled various persons, firms and corporations to dispose of their holdings of stock of Kaiser-Frazer, as aforesaid; in that after said so-called "stabilization" operations had been conducted they wrongfully failed and refused to sign the agreement calling for a commitment on the part of the underwriters to acquire the 1,500,000 shares of stock of defendant Kaiser-Frazer, as aforesaid, and by duress practiced on the officers and directors of defendant Kaiser-Frazer Corporation induced the aforesaid modification of said agreement; and in that they wrongfully inspired and caused to be commenced the aforesaid Masterson action and used same as a pretext for failing to abide by the modified underwriting agreement, and also caused one of its co-underwriters, namely, First California Company, to similarly refuse to abide by said modified underwriting agreement. The aforesaid conduct by all the said defendants has resulted in serious damage to defendant Kaiser-Frazer Corporation, both direct and consequential, in an amount unknown to these plaintiffs, but believed to be in excess of $15,000,000. Such damages embrace, amongst other things, the losses to defendant Kaiser-Frazer Corporation resulting from its expenditure of $2,500,000 in acquiring its own stock at a price in excess of the value thereof and resulting in its inability to use said funds in the normal operations of its business at a time when such funds were necessary to such operations; the loss of profits by defendant Kaiser-Frazer entailed by the deterioration of its good will resulting from the aforesaid machinations of the defendants; the losses to defendant Kaiser-Frazer entailed by the refusal of defendants Eaton and Otis & Co. to abide by the original

underwriting arrangements, pursuant to which the underwriters were to acquire from defendant Kaiser-Frazer and pay for 1,500,000 shares of the stock of Kaiser-Frazer; and the failure and refusal, upon the pretext of the Masterson suit, to comply even with the modified underwriting agreement.

27. Defendant Kaiser-Frazer has as a plaintiff instituted an action against Otis & Co. in the Supreme Court of the State of New York, which action has been removed to the United States District Court for the Southern District of New York, in which it seeks to require Otis & Co. to abide by the modified underwriting agreement and in which it seeks also damages from said defendant Otis & Co. for inducing First California Company to repudiate its obligations under the modified underwriting agreement. The said action, which is extremely limited in scope, does not seek the relief sought on behalf of defendant Kaiser-Frazer by the plaintiffs herein for the reason that the officers and directors of defendant Kaiser-Frazer, defendants herein, are involved and are implicated in the wrongful conduct hereinabove alleged resulting in damage to defendant Kaiser-Frazer far in excess of that sought by the complaint in the aforesaid action and for which, as aforesaid, said officers and directors of defendant Kaiser-Frazer are liable along with defendants Eaton and Otis & Co.

28. Plaintiffs have made no demand upon defendant Kaiser-Frazer or upon its officers or directors to institute action on behalf of Kaiser-Frazer for the relief sought herein, because the said officers and directors of Kaiser-Frazer are involved and implicated in and are responsible for the aforesaid transactions and are liable therefor to defendant Kaiser-Frazer. In connection with the aforesaid transactions they acted negligently, wrongfully and unlawfully to the damage of defendant Kaiser-Frazer Corpora-

tion, as aforesaid; they (except for Walston S. Brown) are defendants herein; and any such demand, as aforesaid, would in the circumstances be useless and futile.

29. This action is not a collusive one conferring upon a court of the United States jurisdiction of an action of which it would not otherwise have jurisdiction.

30. Exclusive of interest and costs the matter in controversy in this action exceeds the sum of $3,000.

31. Plaintiffs have no adequate remedy at law.

For a third cause of action against defendants Joseph W. Frazer, Henry J. Kaiser, Edgar F. Kaiser, G. G. Sherwood, E. E. Trefethen, Jr., Clay P. Bedford, W. A. MacDonald, O. B. Motter, Hickman Price, Jr., The Permanente Metals Corporation, Permanente Products Company, United States of America, Reconstruction Finance Corporation and Kaiser-Frazer Corporation:

32. Plaintiffs repeat and reallege each and every allegation set forth in Paragraphs "1", "2" and "4" hereinabove as though herein set forth at length.

33. Defendant, The Permanente Metals Corporation (hereinafter referred to as "Permanente Metals") is and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Delaware. Since its organization in 1940 (under the name of Todd-California Shipbuilding Corporation), it had engaged primarily in shipbuilding activities and the production of primary magnesium. Following the war last past, it discontinued these activities, and thereafter and in 1946, under circumstances more fully set forth

hereinafter, it commenced engaging, and still engages, in the production of primary aluminum, and the sale of aluminum and aluminum products, mainly in the form of sheet. At all times mentioned herein, it has engaged and still engages in business in the City of Detroit, Michigan, by and through its duly authorized agents, representatives, and its subsidiary corporation, Permanente Products Company, and it had and now has offices for the transaction of its business in the City of Detroit, Michigan, and in the City of Oakland, California.

34. Defendant, Permanente Products Company (hereinafter referred to as "Permanente Products"), is and at all times hereinafter mentioned was a corporation duly organized and existing und · and by virtue of the laws of the State of California. At all such times, it was and still is a wholly owned subsidiary of defendant, Permanente Metals, its affairs and policies are controlled and directed by Permanente Metals, it was and is the agency and instrumentality through and by which defendant, Permanente Metals, makes the substantial part of its aluminum sales, and its affairs and activities were and are in fact integrated with and into those of defendant Permanente Metals. At present, about 75% of the aluminum sales made by Permanente Metals are made by the sales organization of Permanente Products (the balance being made either directly by Permanente Metals or through distributors). At all times mentioned herein, Permanente Products was and is duly authorized to transact business in the state of Michigan and had and now has offices for the transaction of its business in the City of Detroit, Michigan.

35. At all times hereinafter mentioned, defendant, Henry J. Kaiser and various of his business associates, owned and continue to own substantial interests in companies which owned and continued to own until the early

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

part of July, 1948, (when there was a public issue of stock of Permanente Metals) about 65% of the capital stock of Permanente Metals.

Henry J. Kaiser Company owned 27.01% of said capital stock; the stock of Henry J. Kaiser Company in turn is owned 50% (carrying 66⅔% of the voting rights) by defendant, Henry J. Kaiser, 25% by a son of said defendant, defendant Edgar F. Kaiser, and 25% by a Trustee under a trust of which another son of said defendant, Henry J. Kaiser, Jr., is a beneficiary. The Kaiser Company also owned 27.01% of said capital stock of Permanente Metals; the stock of The Kaiser Company in turn is owned 20% by defendant, Edgar F. Kaiser, 20% by the aforesaid trust of which Henry J. Kaiser, Jr., is beneficiary, 6% by defendant, Henry J. Kaiser, and the remaining 54% is divided among seven business associates of defendant, Henry J. Kaiser. Kaiser Engineers, Inc., owned 10.63% of said capital stock of Permanente Metals; the stock of Kaiser Engineers, Inc., is owned 40% by Henry J. Kaiser Company, the rest being divided equally by twelve business associates of defendant, Henry J. Kaiser. Through the aforesaid stock ownerships by himself and his sons and otherwise, defendant, Henry J. Kaiser, has dominated and controlled the various aforesaid "Kaiser" Companies and through them has dominated and controlled Permanente Metals and Permanente Products.

36. In and prior to May, 1946, and since said date, the following defendants have been directors and officers of defendant, Kaiser-Frazer: Henry J. Kaiser (Board Chairman), Joseph W. Frazer, Edgar F. Kaiser (Vice-President and General Manager), G. G. Sherwood (Treasurer and Assistant Secretary), E. E. Trefethen, Jr. (Vice-President and Assistant Secretary), Clay P. Bedford (Vice-President), W. A. MacDonald (Vice-President), O. B. Motter (Vice-President), Hickman Price, Jr. (Vice-President). At

said times, but prior to the month of September, 1946, one H. C. McCaslin was also a director of Kaiser-Frazer; he resigned in September, 1946, and was then succeeded by one Walston S. Brown, who has since been a director (and the Secretary) of Kaiser-Frazer.

37. In and prior to May, 1946, and since said date, the following defendants—directors of Kaiser-Frazer, as aforesaid—have also been directors and officers of Permanente Metals: Henry J. Kaiser (President), Edgar F. Kaiser (Vice-President—not director), E. E. Trefethen, Jr. (Executive Vice-President), and G. G. Sherwood (Vice-President, Secretary and Treasurer). During said period, said persons, and also some of the other directors of Permanente Metals (of whom there are five additional) have occupied similar capacities with Permanente Products. The majority of the directors of Permanente Metals, and in particular the aforementioned defendants who have also been directors of Kaiser-Frazer, have at all said times owned stock in various of the aforesaid "Kaiser" Companies, have held official positions (as officers and directors) in said "Kaiser" Companies, and are included amongst the aforesaid "business associates" of Henry J. Kaiser.

38. In or prior to the year 1946, and in any event prior to the 10th day of May, 1946, Kaiser-Frazer obtained from the War Assets Administration, a letter agreement wherein and whereby the latter agreed to lease to Kaiser-Frazer the Trentwood rolling mill, located at Trentwood, Washington, on the Spokane River. Said plant, built in 1942 and 1943, is on land comprising about 525 acres, and the plant buildings, including office space, have a floor area of approximately 2,250,000 square feet, and are of permanent construction. The plant has facilities for the production of sheet, plate and strip from pig and scrap aluminum; and is also equipped to produce aluminum corrugated roofing,

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

clapboard siding, screening and circular blanks. It has a rated production capacity of 288,000,000 pounds per annum of sheet, plate and strip.

Said letter agreement contemplated a lease to expire on December 31, 1949, with the option in Kaiser-Frazer to extend the term to July 1, 1953, and, if exercised, the further options to extend the term to July 1, 1963; it being further contemplated that if the option to extend the term to July 1, 1953 was exercised, the lessee had the further option to terminate the lease at the end of either 1950 or 1951, on one year's notice.

39. Thereafter, by agreement dated May 10, 1946, the defendants herein caused Kaiser-Frazer to assign to Permanente Metals all its rights under the aforesaid letter agreement, and the only consideration given for said assignment was the assumption by Permanente Metals of Kaiser-Frazer's obligations under the agreement, and the further agreement by Permanente Metals to supply Kaiser-Frazer with aluminum sheet—within specified limits—in the event Kaiser-Frazer should require such sheet, said latter agreement to expire in any event on July 1, 1953. Permanente Metals obtained the lease on the Trentwood rolling mill and thereupon and in July, 1946, became one of the three producers in the United States of primary aluminum.

From July 1, 1946 to May 31, 1947, Permanente Metals in part directly, but primarily through Permanente Products, made gross sales (in dollars) of products from the Trentwood plant in an amount totalling $43,486,000, as against gross sales of products from its other plants in the amount of $742,000. From June 1, 1947 to May 31, 1948, the analogous figures are $58,520,000 for the Trentwood plant, and $3,762,000 for the other plants of Permanente Metals.

The gross profits of Permanente Metals from the sale of aluminum products, constituting in excess of 95% of its gross profits from all sources, and due almost entirely to sales of products from the Trentwood plant, were $12,310,149 for the year ended May 31, 1947, and were $18,533,832 for the year ended May 31, 1948. Permanente Metals' net income (before provision for Federal Income Tax), for the year ended May 31, 1947 was $8,635,684 and for the year ended May 31, 1948 was $15,101,338.

Said profits were earned by Permanente Metals after the payment of substantial sums to various of the "Kaiser" Companies, e. g., the payment to Kaiser Services, the stock of which is wholly owned by Henry J. Kaiser Company, of the sum of $397,982, for "management" services, for the year ended May 31, 1948; the payment to Henry J. Kaiser Company of the sum of $70,307 for "office rental" and other charges for the same period; the payment to Kaiser Company, Inc., the stock of which is owned by Henry J. Kaiser, Edgar F. Kaiser and their associates, of the sum of $32,127 for "use of sales offices" etc., for the same period; and the payment to Kaiser Engineers, Inc., of the sum of $76,507 for "engineering" and other services for the same period.

40. At the time of the assignment of the aforesaid letter agreement between Kaiser-Frazer and the War Assets Administration to Permanente Metals, the directors of Kaiser-Frazer, defendants herein, should have known and knew that: Said agreement and the lease contemplated thereby created the opportunity for very substantial profits; Kaiser-Frazer had, on the basis of its own credit and financial standing, and through its own facilities expenditures and resources, obtained said letter agreement for Kaiser-Frazer; said Kaiser-Frazer had or could have obtained all the facilities and services necessary to exploit said opportunity in the same manner and to the same extent, at least, as those facilities were possessed by or obtained by Permanente Metals; in the then circumstances and on the basis of proper analyses, then available and obtainable, the Trent-

wood enterprise was assured of substantial profits; and, had the assignment not been made, Kaiser-Frazer could and would have realized substantial profits from the Trentwood plant.

In causing Kaiser-Frazer to make said assignment, defendants, directors and officers of Kaiser-Frazer, acted with gross negligence, with reckless indifference to the rights and interests of Kaiser-Frazer, and in violation of their fiduciary duties to Kaiser-Frazer; the purported consideration therefor was negligible and of no real value. In effectuating said transaction, the directors and officers of Kaiser-Frazer acted in wrongful and fraudulent conspiracy with and under the domination of the aforesaid common directors and officers of Kaiser-Frazer and Permanente Metals, and in wrongful and fraudulent conspiracy with Permanente Metals, and for the purpose and with the effect of benefiting, enriching and advantaging Permanente Metals, the various Kaiser Companies which had the majority stock interest in Permanente Metals, the aforesaid common directors and other business associates of the Kaisers. The said transaction and the resultant substantial profits to Permanente Metals, directly, and to the others, and particularly the Kaiser interests, indirectly, were made possible and effectuated through the use of the credit, facilities, expenditures and resources, of Kaiser-Frazer and the diversion from it of the opportunity which it had of making profits, which were substantial and assured. Said transaction was wrongful and fraudulent as to Kaiser-Frazer, the asset improperly diverted from it was unique and irreplaceable, and the profits of which it was improperly deprived were substantial and running into tens of millions of dollars.

41. By reason of the premises Kaiser-Frazer is entitled to a decree of this Honorable Court declaring: That Permanente Metals holds its aforesaid lease on the Trentwood

plant in trust for Kaiser-Frazer; that the said lease be assigned, transferred and set over to and for the benefit of Kaiser-Frazer; that Permanente Metals and Permanente Products account for and pay over to Kaiser-Frazer all profits made by and through the operation of the Trentwood plant, and the sale of products manufactured thereat, undiluted by any sums which may be found to have been wrongfully paid over to the various "Kaiser" Companies, as aforesaid; and that all defendants similarly account to Kaiser-Frazer for all such profits and for any and all damages sustained by Kaiser-Frazer as a result of the wrongful transaction herein alleged.

Permanente Products is named as a defendant herein for the reason that, as aforesaid, it is a wholly owned subsidiary of Permanente Metals, is the agency and instrumentality used by Permanente Metals to effectuate the substantial part of the sales made by it, has in its corporate treasury at least some of the profits made from such sales, and the accounting for profits, herein requested, will be facilitated thereby.

War Assets Administration is an agency of the United States of America, the latter being named a defendant herein on its behalf. Reconstruction Finance Corporation is a corporation created by Act of Congress and is also named herein as a defendant. Said defendants have offices for the transaction of business in the City of Detroit, Michigan and are named party defendants herein, because the original letter agreement involving the Trentwood plant, as aforesaid was made by said War Assets Administration, and it (or the United States of America) is the lessor under the lease of said Trentwood plant and because Reconstruction Finance Corporation is or may similarly be a party to said lease. No claim whatsoever is made against either of said defendants, except that they honor and consent to such decree as may be made by this Court

directing the assignment of the said lease by Permanente Metals to Kaiser-Frazer, if, under the circumstances, such consent may be deemed either proper or necessary. Any reference otherwise herein, in this cause of action, made to "defendants" in general terms is not to be taken as including either United States of America (War Assets Administration) or Reconstruction Finance Corporation.

42. Plaintiffs have made no demand upon defendant Kaiser-Frazer or upon its officers or directors to institute an action on behalf of Kaiser-Frazer for the relief sought herein because the said officers and directors, with the single exception of Walston S. Brown, were directors and officers of Kaiser-Frazer at the time of the transaction complained of herein, are responsible for said transaction and are liable therefor to defendant, Kaiser-Frazer. They were parties to the plan and conspiracy to benefit and enrich defendant, Permanente Metals, directly, and the various "Kaiser" Companies, the Kaisers and their business associates, as aforesaid, indirectly; they are defendants herein; and any such demand, as aforesaid, would in the circumstances be useless and futile.

The futility of such demand, moreover, is further indicated by the following facts:

On or about June 21, 1948, Otis & Co. (a defendant in the second cause of action contained herein), as a stockholder of Kaiser-Frazer, and as one of the underwriters of issues of its stock sold to the public, in a telegram addressed to Kaiser-Frazer and its directors and officers, advised the latter that it considered the assignment from Kaiser-Frazer to Permanente Metals of the aforesaid letter agreement with War Assets Administration deprived Kaiser-Frazer of a valuable asset in exchange for an inadequate consideration, that such transfer was in violation of the fiduciary duties of said directors and officers to Kaiser-Frazer, and was a fraud upon Kaiser-Frazer

and its stockholders; and in said telegram, demand was made that the Trentwood plant and the aforesaid lease thereon be restored to Kaiser-Frazer, and that Permanente Metals and other defendants herein, particularly Henry J. Kaiser and Edgar F. Kaiser, account to Kaiser-Frazer for profits wrongfully obtained by them as a result of such transfer. On or about June 22, 1948, said Otis & Co. sent a further telegram to the directors of Kaiser-Frazer demanding that appropriate action be taken in the premises to restore the Trentwood plant to Kaiser-Frazer, and for an appropriate accounting.

On or about June 25, 1948, the directors of Kaiser-Frazer, including Walston S. Brown, at a meeting duly convened and held rejected the aforesaid demand that legal action be instituted upon the pretext that its reconsideration of the facts did not disclose any facts indicating that the transaction was not in the best interests of Kaiser-Frazer. In view of the facts, hereinabove alleged, the said refusal of the directors of Kaiser-Frazer to institute appropirate action on its behalf was due to inexcusable neglect on their part and reckless indifference to the welfare of said Kaiser-Frazer. Moreover, the Board, in so refusing to institute appropriate proceedings, was subject to and subjected to improper control and domination by the defendants Kaiser. Moreover, as aforesaid, the said directors (with the possible exception of Waltson S. Brown) were not in a position to exercise a fair, honest and independent judgment inasmuch as they themselves were parties to the aforesaid plan and conspiracy, and are liable for the consequences thereof, as hereinabove alleged.

43. This action is not a collusive one conferring upon a court of the United States jurisdiction of an action of which it would not otherwise have jurisdiction.

44. Exclusive of interest and costs the matter in controversy in this action exceeds the sum of $3,000.

Exhibit 1. Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

45. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs respectfully pray for judgment as follows:

(a) That defendants and each of them other than defendant Kaiser-Frazer Corporation account for their acts and conduct as directors and officers of said defendant Kaiser-Frazer Corporation and as conspirators in respect of and participants in said acts and conduct, and that they be directed to account for all moneys, assets, facilities and property of said defendant Kaiser-Frazer Corporation which were negligently, wrongfully, unlawfully and fraudulently wasted, diverted, misapplied, misappropriated and lost, and that they be directed to pay over and to restore to said defendant Kaiser-Frazer Corporation any and all sums of money thus accounted for;

(b) That it be decreed and adjudged that defendant, The Permanente Metals Corporation holds the aforesaid lease on the Trentwood plant in trust for defendant, Kaiser-Frazer Corporation, and that said The Permanente Metals Corporation be directed to assign, transfer and set over said lease to and for the benefit of defendant, Kaiser-Frazer Corporation; and that defendant, The Permanente Metals Corporation, and defendant, Permanente Products Corporation, account for and pay over to defendant, Kaiser-Frazer Corporation, all profits made by them by and through the operation of the Trentwood plant, and the sale of products manufactured thereat;

(c) That defendants and each of them other than defendant Kaiser-Frazer Corporation be directed to account for all secret gains, profits, advantages and benefits received by them, or any of them, directly or indirectly, through the wrongful, improper and illegal use of the moneys, assets, facilities and property of defendant Kaiser-Frazer Corporation and that they be directed to repay,

restore and pay over all such moneys and properties so acquired or the value thereof;

(d) That defendants and each of them, other than defendant Kaiser-Frazer Corporation, account to said defendant Kaiser-Frazer Corporation, for their acts and conduct herein complained of, and that they be directed to pay over and restore to said defendant Kaiser-Frazer Corporation all losses occasioned by their acts and conduct, and all profits or gains realized by them by said acts and conduct;

(e) That plaintiffs be given such other and further relief as may be just and proper in the premises, together with the costs and disbursements of this action.

SAMUEL L. CHESS,
17 John Street,
New York 7, N. Y.

FISCHER & FISCHER,
2320 Guardian Building,
Detroit 26, Michigan.

PERLMAN, GOODMAN, HECHT & CHESLER,
10 South LaSalle Street,
Chicago, Illinois,
Attorneys for Plaintiffs.

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

JEROME R. PERGAMENT, being duly sworn, deposes and says: That he is one of the above named plaintiffs herein; that he has read and knows the contents of the foregoing amended complaint; that the same is true of his own knowledge except as to matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

JEROME R. PERGAMENT.

JEROME R. PERGAMENT.

Sworn to before me, this }
22nd day of July, 1948. }

MARTIN M. CHESS

MARTIN M. CHESS
Commissioner of Deeds N. Y. City
N. Y. Co. Clk's No. 8 Reg. No. 0-C-43
Bronx Co. Clk's No. 2 Reg. No. 0-C-17
Kings Co. Clk's No. 26 Reg. No. 50-C-31
Commission Expires Jan. 27, 1950

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

GEORGE J. LONDON, being duly sworn, deposes and says: That he is one of the above named plaintiffs herein; that he has read and knows the contents of the foregoing amended complaint; that the same is true of his own knowledge except as to matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

GEORGE J. LONDON.

GEORGE J. LONDON.

Sworn to before me, this }
22nd July, 1948. }

EDWARD J. SCANLON
Notary Public of New Jersey
My Commission Expires Aug. 30, 1949.

(NOTARIAL SEAL)

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

Amendments to Amended Complaint.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE EASTERN DISTRICT OF MICHIGAN,

SOUTHERN DIVISION.

JEROME R. PERGAMENT, *et al.*, Plaintiffs, *vs.* JOSEPH W. FRAZER, *et al.*, Defendants.	Civil Action. No. 7354.

Paragraph 1 of the Amended Complaint is hereby amended to read as follows:

"1. Plaintiffs are stockholders of Kaiser-Frazer Corporation. Plaintiff Jerome R. Pergament, is and has been since some time prior to the commencement of this action, a resident of the County, City and State of New York, and a citizen of the State of New York, and plaintiff George J. London, is and has been since some time prior to the commencement of this action, a resident of Jersey City, County of Hudson and State of New Jersey, and a citizen of the State of New Jersey. Plaintiff George J. London acquired shares of common stock of Kaiser-Frazer Corporation on or about October 22nd, 1945, and has been such stockholder, holding and owning said shares of stock continuously since said date, and was such stockholder at the time of all of the transactions

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

complained of in the Amended Complaint. Plaintiff Jerome R. Pergament acquired shares of the common stock of Kaiser-Frazer Corporation by purchase, and as an investment, on or about the 2nd day of December, 1947, acquiring said shares in good faith, without knowledge of such of the transactions complained of in the Amended Complaint as occurred prior to his purchase of said shares, the said Jerome R. Pergament having no intent at the time of the acquisition of said shares to institute litigation in connection with any of the acts and transactions complained of in the Amended Complaint.

"Jurisdiction of this court depends and is sustainable upon the ground of diversity of citizenship."

Paragraph 15 of said Amended Complaint is amended to read as follows:

"15. Plaintiffs repeat and reallege each and every allegation set forth in Paragraph 1, as hereby amended, and Paragraph 2 of the Amended Complaint, as though herein set forth at length."

Paragraph 32 of said Amended Complaint is amended to read as follows:

"32. Plaintiffs repeat and reallege each and every allegation set forth in Paragraph 1 of the Amended Complaint, as hereby amended, and Paragraphs 2 and 4 of said Amended Complaint, as though herein set forth at length."

JEROME R. PERGAMENT
GEORGE J. LONDON

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

JEROME R. PERGAMENT, being duly sworn, deposes and says that he is one of the above named plaintiffs herein; that he has read and knows the contents of the Amended Complaint and each of the causes of action therein alleged and of the foregoing amendments to the Amended Complaint; that said Amended Complaint is true of his own knowledge, except as to matters therein stated to be alleged on information and belief, and as to such matters, he believes it to be true; that the amendments to the Amended Complaint, insofar as the same relate specifically to him, are true of his own knowledge.

JEROME R. PERGAMENT

Subscribed and sworn to before me
this 6th day of January, 1949.

DAVID ARONOWITZ
Notary Public, State of New York
Residing in Kings Co. No. 70, Reg. No. 304-A-O
Certificate filed in N. Y. Co. No. 170, Reg. No. 454-A-O
Commission Expires March 30, 1950.

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

GEORGE J. LONDON, being duly sworn, deposes and says that he is one of the above named plaintiffs herein; that he has read and knows the contents of the Amended Complaint and each of the causes of action therein alleged and of the foregoing amendments to the Amended Complaint; that said Amended Complaint is true of his own knowledge, except as to matters therein stated to be alleged on information and belief, and as to such matters, he believes it to be true; that the amendments to the Amended Complaint, insofar as the same relate specifically to him, are true of his own knowledge.

GEORGE J. LONDON

Subscribed and sworn to before me }
this 6th day of January, 1949. }

EDWARD J. SCANLON
Notary Public
Notary Public of New Jersey
My Commission Expires Aug. 30, 1949.

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

Notice.

DISTRICT COURT OF THE UNITED STATES,

FOR THE

EASTERN DISTRICT OF MICHIGAN,

SOUTHERN DIVISION.

JEROME R. PERGAMENT, *et al.*, Plaintiffs, *v.* JOSEPH W. FRAZER, *et al.*, Defendants.	Civil Action. File No. 7354.

To:

BUTZEL, EAMAN, LONG, GUST & KENNEDY, Esqs.,
1881 National Bank Building,
Detroit 26, Michigan,
Attorneys for Kaiser-Frazer Corporation, and certain individual defendants.

BODMAN, LONGLEY, BOGLE, MIDDLETON & ARMSTRONG, Esqs.,
1400 Buhl Building,
Detroit 26, Michigan.
Attorneys for Graham-Paige Motors Corporation.

GEORGE E. BRAND, Esq.,
3709-3723 Barlum Tower,
Detroit 26, Michigan,
Attorney for The Permanente Metals Corporation and Permanente Products Company.

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

DYKEMA, JONES & WHEAT, Esqs.,
2746 Penobscot Building,
Detroit 26, Michigan,
Attorneys for Otis & Co.

Gentlemen:

PLEASE TAKE NOTICE that upon the trial of the above entitled action, the undersigned, on behalf of the above named plaintiffs, will move to amend and supplement the amended complaint herein so that same shall include the following allegations and prayers for relief:

I.

Following Paragraph 40 of said amended complaint:

40a. Thereafter and in or about the month of October, 1949, said defendant, Permanente Metals, then being in possession of the Trentwood Rolling Mill under said lease, acquired title to said plant from the lessor thereof or some other agency of the United States, and at or about the same time, the said defendant, then being in possession of the Mead and Baton Rouge plants, under leases, also obtained title to said plants, all as more fully described hereinafter, the purchase price being paid by payment of a small percentage of the total thereof and by agreement to pay the balance in installments partly in cash and partly through the delivery to the government of aluminum ingots.

40b. Under the letter agreement referred to in Paragraph 38 of the amended complaint, which was dated March 27, 1946, the War Assets Administration also agreed to lease, not to Kaiser-Frazer, but to Kaiser Cargo, Inc., a company in which Henry J. Kaiser and his associates were and still are officers and directors and principal or sole stockholders (and the name of which was subsequently

changed in 1946 to Kaiser Fleetwings Inc., and again later changed to Kaiser Metal Products Corporation), the so-called Spokane, Washington reduction plant, at Mead, Washington, near Spokane, which plant is herein referred to as the Mead plant. Furthermore, on August 16, 1946, Kaiser Cargo, Inc., obtained from War Assets Administration, a letter agreement wherein and whereby the latter agreed to lease to Kaiser Cargo, Inc., a plant at Baton Rouge, Louisiana, herein referred to as the Baton Rouge plant, with facilities for the production of alumina from bauxite ore. Kaiser Cargo, Inc., assigned these agreements to Permanente Metals, which, pursuant thereto, obtained leases on said plants (on the Mead plant on July 19, 1946, and on the Baton Rouge plant on November 1, 1946), and thereafter and in or about October, 1949, said defendant, Permanente Metals, acquired title to said plant, along with the Trentwood plant, as alleged in Paragraph 40a hereof.

40c. The said three (3) plants, namely, the Trentwood plant, the Mead plant and the Baton Rouge plant, had been built by the United States Government in 1942 and 1943, and they were designed to permit an integrated use and operation. The Baton Rouge plant, as aforesaid, had facilities for the production of, and did produce, alumina from bauxite ore. The Mead plant was designed to and did produce primary aluminum in pig form from alumina produced at the Baton Rouge plant. At the Trentwood plant, the aluminum pig produced at the Mead plant was and is remelted and manufactured into finished or semi-finished aluminum products. In making the aforesaid agreements and leases, and ultimate sales of the said plants, it was the purpose of the government to foster a new and fully integrated enterprise which could become a completely independent operator, so that competition in the aluminum industry could be effectually furthered, and said plants were all put in operating condition at the cost and expense

of the government, and without expense to Permanente Metals.

40d. In or about the month of June, 1949, and to supplement the operations of Permanente Metals at the Trentwood, Mead and Baton Rouge plants, Permanente Metals acquired from the United States, through War Assets Administration, an aluminum rod and bar mill at Newark, Ohio.

40e. Not only was the letter of intent of March 27, 1946, with respect to the Trentwood plant made with Kaiser-Frazer, but to the knowledge of the defendants, the opportunities to obtain leases on the Mead and Baton Rouge plants, and ultimately to acquire said Trentwood, Mead and Baton Rouge plants, and the opportunity to acquire the aforesaid mill at Newark, Ohio, were opportunities which were offered to or were readily available to Kaiser-Frazer, and they were opportunities which in the light of the above facts and others, and particularly the existence of a large demand for aluminum products, and the possession of or availability to Kaiser-Frazer of the resources and facilities necessary to exploit said opportunities, and the assurance of substantial profits, should and could have been taken and exercised on behalf of Kaiser-Frazer, and would have been so taken and exercised, if the directors and officers of Kaiser-Frazer had properly exercised their fiduciary duties to Kaiser-Frazer. In causing said Kaiser-Frazer to relinquish or be deprived of said opportunities and in enabling them to be taken and exercised on behalf of Kaiser Cargo, Inc. (now known as Kaiser Metal Products Corporation), and Permanente Metals, the directors and officers of Kaiser-Frazer acted with gross negligence, with reckless indifference to the rights and interests of Kaiser-Frazer, and in violation of their duties to Kaiser-Frazer, and in wrongful and fraudulent conspiracy with Kaiser Cargo, Inc. (now known as Kaiser Metal Products

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

Corporation), and Permanente Metals, and the officers and directors thereof, and for the purpose and with the effect of benefiting, enriching and advantaging Permanente Metals, the various Kaiser companies which had the majority stock interests in Permanente Metals, the aforesaid common directors of Kaiser-Frazer and Permanente Metals and other business associates of the Kaisers. The aforesaid profits made by Permanente Metals, referred to in Paragraph 39 of the amended complaint, and the profits thereafter made, were enabled to be made in part through the operations of the Mead and Baton Rouge plants and the mill at Newark, Ohio, as well as the operations of the Trentwood plant.

The following paragraph is to be substituted for Paragraph 41 contained in said amended complaint:

41. By reason of the premises, Kaiser-Frazer is entitled to a decree of this Honorable Court declaring: That Permanente Metals holds the said Trentwood, Mead and Baton Rouge plants and the Newark, Ohio, mill in trust for Kaiser-Frazer; that title to said plants and mill be assigned, transferred and set over to and for the benefit of Kaiser-Frazer, upon the assumption by Kaiser-Frazer of the obligations incurred under any purchase agreements by Permanente Metals; that Permanente Metals and Permanente Products account for and pay over to Kaiser-Frazer all profits made by and through the operations of said plants and mill, and the sale of products manufactured thereat, undiluted by any sums which may be found to have been wrongfully paid over to the various "Kaiser Companies", as aforesaid; and that all defendants similarly account to Kaiser-Frazer for all such profits and for any and all damages sustained by Kaiser-Frazer as a result of the wrongful transactions herein alleged.

Permanente Products is named as a defendant herein for the reason that, as aforesaid, it is a wholly owned sub-

sidiary of Permanente Metals, is the agency and instrumentality used by Permanente Metals to effectuate the substantial part of the sales made by it, has in its corporate treasury at least some of the profits made from such sales, and the accounting for profits and damages herein requested will be facilitated thereby.

II.

To add a Fourth Cause of Action to said amended complaint, which said cause of action shall read as follows:

For a Fourth Cause of Action against Defendants, Joseph W. Frazer, Henry J. Kaiser, Edgar F. Kaiser, G. G. Sherwood, E. E. Trefethen, Jr., Clay P. Bedford, W. A. MacDonald, O. B. Motter, Hickman Price, Jr., and Kaiser-Frazer Corporation:

46. Plaintiffs repeat and reallege each and every allegation set forth in Paragraphs 1 (as heretofore amended by "Amendments to Amended Complaint", filed and served January 12, 1949), 2 and 4 of the amended complaint as though herein set forth at length.

47(a) The directors and officers of Kaiser-Frazer have caused Kaiser-Frazer to make various arrangements with Kaiser Fleetwings Inc., a company owned and controlled by Henry J. Kaiser and his business associates, as aforesaid (the name of which was theretofore Kaiser Cargo, Inc., and which has since been changed to Kaiser Metal Products Corporation), under which said Kaiser Fleetwings Inc. performed for Kaiser-Frazer various aspects of the work necessary in the manufacture of automobiles and the parts thereof, including doors and deck lids, and under which said Kaiser Fleetwings Inc. sold to Kaiser-

Exhibit 1, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

Frazer doors and deck lids for use in automobiles manufactured by Kaiser-Frazer. In connection with said agreements, and pursuant thereto, the directors and officers of Kaiser-Frazer caused Kaiser-Frazer to acquire and furnish to Kaiser Fleetwings Inc. machinery and other equipment aggregating millions of dollars in cost and value for use by Kaiser Fleetwings Inc. in manufacturing said automobile parts for Kaiser-Frazer. In these transactions, Kaiser-Frazer was caused to pay excessive and exorbitant prices for the work done by Kaiser Fleetwings Inc. for Kaiser-Frazer, and the products sold to Kaiser-Frazer by Kaiser Fleetwings Inc., prices which were far in excess of the fair and reasonable value of said work, and the market or fair and reasonable value of said products, and in addition Kaiser-Frazer could and should have obtained said work and products from other sources without the substantial investment in machinery and equipment acquired and furnished for the use of Kaiser Fleetwings Inc., as aforesaid.

(b) In causing Kaiser-Frazer to make said arrangements with Kaiser Fleetwings Inc., the directors and officers of Kaiser-Frazer were acting in a manner detrimental to the interests of Kaiser-Frazer for the benefit, advantage and unjust enrichment of Kaiser Fleetwings Inc., and said directors and officers of Kaiser-Frazer acted wrongfully and fraudulently and in breach of their fiduciary duties to Kaiser-Frazer, and said acts and activities and the arrangements made, as aforesaid, resulted in damages to Kaiser-Frazer, and a waste of its funds and assets in an amount now not known to plaintiffs, but for which the individual defendants are accountable, and should be compelled to account to Kaiser-Frazer.

48. In or about the month of June, 1946, the directors and officers of Kaiser-Frazer caused Kaiser-Frazer to make an agreement with Graham-Paige Motors Corp., wherein

and whereby the funds, moneys and credits of Kaiser-Frazer were used in whole or in part to finance a business venture on the part of Graham-Paige, at Long Beach, California, for the manufacture of farm equipment. Kaiser-Frazer had no interest in said venture, nor any expectancy therein, and said arrangement to finance said venture was wholly outside the legitimate scope of the activities of Kaiser-Frazer. The use of the moneys, funds and credits of Kaiser-Frazer in connection with said venture was intended to advantage Graham-Paige at the expense of and to the detriment of Kaiser-Frazer, and the acts of the directors and officers of Kaiser-Frazer in causing Kaiser-Frazer's moneys, funds and credit so to be used, were wrongful and fraudulent and in violation of their fiduciary duties to Kaiser-Frazer, and have resulted in damage to Kaiser-Frazer, and a waste of its funds and assets for which the individual defendants herein are accountable to and should be made to account to Kaiser-Frazer.

49. (a) Under date of April 1, 1946, the directors and officers of Kaiser-Frazer caused Kaiser-Frazer to lease from the United States Government certain buildings located at Long Beach, California (formerly part of an aircraft manufacturing plant owned by the government, and operated by Douglas Aircraft Company). Said lease was for a term of four years, and eleven months, with an option to renew for an additional five year term. The annual rent was $115,793 for the first year, $173,690 for the second year and $231,856 for each year thereafter. By letter of intent dated February 12, 1947, the War Assets Administration agreed to enter into an amendment under which certain additional property would be included in the leased premises, the rental would be increased $63,836 per annum, and Kaiser-Frazer would be granted an option to purchase the property for $3,000,000. Said

property was leased for the purpose of having it available as a west coast assembly plant for Kaiser-Frazer. The directors and officers of Kaiser-Frazer caused approximately $2,200,000 of the moneys of Kaiser-Frazer to be expended for the equipment of said plant. In the Fall of 1946, work on said plant was suspended and since that time, nothing further has been done or performed in connection therewith. However, the rent at the rates provided as above have continued to run and have continued to be paid by Kaiser-Frazer.

(b) In causing Kaiser-Frazer to make the aforesaid lease, the directors and officers of Kaiser-Frazer acted negligently, improvidently and recklessly and without sufficient or proper evaluation of the needs of Kaiser-Frazer and the ability of Kaiser-Frazer to properly equip said plant in order to enable it to function and to put it in effective operation. As a result of said transaction, Kaiser-Frazer has sustained damages running into millions of dollars for which the directors and officers of Kaiser-Frazer are accountable to and should be made to account to Kaiser-Frazer.

50. (a) In or about the months of May and June, 1946, and from time to time thereafter until the Fall of 1947, the directors and officers of Kaiser-Frazer caused Kaiser-Frazer to make large purchases of steel ingots from Kaiser Steel Co., Inc. (the name of which has since been changed to Kaiser Steel Corporation), a corporation owned and controlled by Henry J. Kaiser and his business associates, in quantities which were excessive and not needed in the business.

(b) In or about the Fall of 1947, and from time to time thereafter, the directors and officers of Kaiser-Frazer caused Kaiser-Frazer to make large purchases and continue to purchase from said Kaiser Steel Co., Inc., slab steel in

quantities which were excessive and not needed in the business of Kaiser-Frazer.

(c) In the aforesaid transactions, Kaiser-Frazer was caused to pay excessive and exorbitant prices for the steel sold to Kaiser-Frazer by said Kaiser Steel Co., Inc., prices which were far in excess of the market or the fair and reasonable value thereof. In causing Kaiser-Frazer to engage in said transactions with said Kaiser Steel Co., Inc., the directors of Kaiser-Frazer acted wrongfully and fraudulently and in breach of their fiduciary duties to Kaiser-Frazer, and with the intent of benefiting and advantaging Kaiser Steel Co., Inc., at the expense of and to the detriment of Kaiser-Frazer. Said transactions have resulted in damage to Kaiser-Frazer in an amount now unkonwn to plaintiffs, but for which said individual defendants are accountable to and should be made to account to Kaiser-Frazer.

51. Plaintiffs repeat and reallege each and every allegation set forth in Paragraphs 28, 29, 30 and 31 of the amended complaint as though herein set forth at length.

III.

With respect to the prayers for relief substitute the following for Paragraph (b) of the prayer for judgment, as contained in the amended complaint:

(b) That it be decreed and adjudged that defendant, The Permanente Metals Corporation, hold the Trentwood, Mead and Baton Rouge plants, and the mill at Newark, Ohio, in trust for defendant, Kaiser-Frazer Corporation, and that said The Permanente Metals Corporation be directed to assign, transfer and set over said plants and mill to and for the benefit of defendant, Kaiser-Frazer Corporation, upon the assumption by Kaiser-Frazer Cor-

poration of the obligations incurred under any purchase agreements by The Permanente Metals Corporation; and that defendant, The Permanente Metals Corporation, and defendant, Permanente Products Corporation, account for and pay over to defendant, Kaiser-Frazer Corporation, all profits made by them by and through the operation of said plants and mill and the sale of products manufactured thereat; and that the defendants and each of them, other than defendant Kaiser-Frazer Corporation, be directed to account for all profits realized by them and all damages sustained by Kaiser-Frazer Corporation as the result of the wrongful and fraudulent conversion of the said plants and mill, and the opportunity to profit therefrom, from Kaiser-Frazer Corporation to The Permanente Metals Corporation.

Dated, October 22, 1949.

SAMUEL L. CHESS,
17 John Street,
New York 7, N. Y.

FISCHER & FISCHER,
2320 Guardian Building,
Detroit 26, Michigan.

PERLMAN, GOODMAN, HECHT & CHESLER,
10 LaSalle Street,
Chicago 3, Illinois.
Attorneys for Plaintiffs.

Exhibit 2, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION.

JEROME R. PERGAMENT and GEORGE J. LONDON, suing on their own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated and in the right of and on behalf of Kaiser-Frazer Corporation,

Plaintiffs,

against

JOSEPH W. FRAZER, HENRY J. KAISER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., GRAHAM-PAIGE MOTORS CORPORATION, OTIS & CO., CYRUS EATON, THE PERMANENTE METALS CORPORATION, PERMANENTE PRODUCTS COMPANY, UNITED STATES OF AMERICA, RECONSTRUCTION FINANCE CORPORATION and KAISER-FRAZER CORPORATION,

Defendants.

Civil No. 7354.

To All Stockholders of the Defendant,
KAISER-FRAZER CORPORATION:

By order to show cause dated November 9, 1949, the undersigned Judge of the United States District Court for the Eastern District of Michigan, directed the parties to the above action and the stockholders of Kaiser-Frazer

Exhibit 2, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

Corporation to show cause why, among other things, a certain agreement dated October 25, 1949 (Exhibit No. 1 annexed to said order to show cause) should not be approved, carried out and put into effect.

Said agreement provides in part as follows:

"WHEREAS, the plaintiffs deem it in the best interest of Kaiser-Frazer and all of the stockholders of Kaiser-Frazer that the stockholders derivative action be dismissed and compromised upon the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the premises and of the mutual promises and agreements of the parties hereinafter set forth, the parties agree as follows:

1. The individual defendants and the corporate defendants will do or cause to be done the following:

(a) The giving of guaranties by Henry J. Kaiser Company, a Nevada corporation, and Kaiser-Industries, Inc., a Nevada corporation, to the extent in the aggregate of $15,000,000 of

(i) payment of interest on and principal of a certain loan to be obtained from Reconstruction Finance Corporation by Kaiser-Frazer in the principal amount of not to exceed $34,400,000 bearing interest at the rate of 4% per annum and repayable over a period of approximately ten years, all subject to such terms and conditions as may be agreed to between Kaiser-Frazer and Reconstruction Finance Corporation, and

(ii) the payment by Kaiser-Frazer Sales Corporation, a wholly owned subsidiary of Kaiser-Frazer, of interest on and principal of such sums as said Kaiser-Frazer Sales Corporation may

Exhibit 2, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

from time to time borrow under a $10,000,000 revolving line of credit to be in effect for a period of approximately one year and a half, as established by Reconstruction Finance Corporation pursuant to agreement to be entered into between said Kaiser-Frazer Sales Corporation and Reconstruction Finance Corporation,

such guaranties to be upon such terms as may be agreed to between said Henry J. Kaiser Company and Kaiser Industries, Inc. and Reconstruction Finance Corporation.

(b) The pledging by said Henry J. Kaiser Company and Kaiser Industries, Inc. of collateral having a sound value in the opinion of the Board of Directors of said Reconstruction Finance Corporation, of not less than $10,000,000 to secure the performance of the guaranties referred to in sub-paragraph (a) of this paragraph 1, all as may be agreed to between said Henry J. Kaiser Company and Kaiser Industries, Inc. and Reconstruction Finance Corporation.

(c) The payment to Kaiser-Frazer of the sum of $500,000.

(d) The purchase from Kaiser-Frazer by Kaiser Metal Products, Inc. of certain metal presses and related equipment located in the plant of Kaiser Metal Products, Inc. at Bristol, Pa., for an amount equal to the value of such presses as shown on the books and records of Kaiser-Frazer as of September 30, 1949, to wit, the sum of $879,503.30."

Commencing on December 6, 1949, hearings were held before this Court pursuant to said order to show cause and the following additional facts, among others, appeared:

1. On November 7, 1949, the guaranties of Henry J. Kaiser Company and Kaiser Industries, Inc.

referred to in the settlement agreement were delivered to Reconstruction Finance Corporation and the pledge of collateral referred to in said agreement was then made;

2. On November 9, 1949, $12,000,000 was received by Kaiser-Frazer Corporation from Reconstruction Finance Corporation on the $34,400,000 loan referred to in said agreement; to date a total of $14,017,897.41 has been received; and additional amounts may be received by Kaiser-Frazer Corporation from Reconstruction Finance Corporation on said loan prior to the order of the Court on the settlement agreement;

3. On November 7, 1949, Kaiser-Frazer Sales Corporation executed all papers necessary to obtain the revolving line of credit referred to in said agreement, and on November 9, 1949, received from the Reconstruction Finance Corporation $7,118,071 thereunder, which is the maximum borrowing under said revolving line of credit to date; further borrowing may be made under said revolving line of credit prior to the order of the Court on the settlement agreement;

4. Purchase from Kaiser-Frazer Corporation by Kaiser Metal Products, Inc. of the presses and related equipment referred to in the settlement agreement was made on December 13, 1949. The purchase price of $879,503.30 has been paid from the proceeds of a $4,500,000 insurance company loan secured by a mortgage executed by Kaiser Metal Products, Inc. on its plant and equipment, and recorded December 12, 1949, which mortgage includes said metal presses and related equipment.

Those favoring the proposed settlement contend that the notice to stockholders dated November 9, 1949, was adequate, fair, complete and clear; while those who oppose the proposed settlement contend

Exhibit 2, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

that said notice was inadequate, unfair, fraudulent and misleading. Without making any determination thereon, and without enumerating the many contentions, claims, and reasons, pro and con, advanced by each of the several groups present, particularly as to whether the consideration for the proposed settlement was, or is, in truth and in fact, as represented therein, this Court has directed that this additional notice be sent to all stockholders of Kaiser-Frazer Corporation for their information.

You are also advised that this settlement, if approved, will settle all claims that are asserted in the several stockholders suits brought against Kaiser-Frazer Corporation, *et al.*

You are hereby further advised that the hearing will be resumed on January 17, 1950, at ten o'clock in the forenoon, in my Courtroom, 712 Federal Building, Detroit, Michigan. At that time this Court intends to proceed with the taking of testimony which he believes is necessary before the sufficiency and contents of the original notice, and all other questions, including approving or disapproving of the proposed settlement agreement, may be properly weighed, passed upon and determined. Said hearing may be adjourned from time to time without further notice other than by the announcement of the adjourned date at the hearing.

Dated: Detroit, Michigan, December 20, 1949.

FRANK A. PICARD,
United States District Judge

Exhibit 3, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

UNITED STATES OF AMERICA.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION.

JEROME R. PERGAMENT and GEORGE J. LONDON, suing on their own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated and in the right of and on behalf of Kaiser-Frazer Corporation,

Plaintiffs,

against

JOSEPH W. FRAZER, HENRY J. KAISER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., GRAHAM-PAIGE MOTORS CORPORATION, OTIS & CO., CYRUS EATON, THE PERMANENTE METALS CORPORATION, PERMANENTE PRODUCTS COMPANY, UNITED STATES OF AMERICA, RECONSTRUCTION FINANCE CORPORATION and KAISER-FRAZER CORPORATION,

Defendants.

Civil No. 7354.

Order Approving Compromise and Settlement and Dismissing Action.

The petition of the plaintiffs and of the defendant Kaiser-Frazer Corporation, filed herein on November 9, 1949, for approval of the agreement of settlement and

Exhibit 3, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

compromise thereto annexed as Exhibit 1 and for dismissal of this action having duly and regularly come on for hearing; and the Court having taken the proofs of the parties who appeared in support of said petition and in opposition thereto; and having heard the arguments and read the briefs of counsel; and the petitioners and other parties to said agreement having consented that the general release provisions contained in paragraph 2 of said agreement shall be limited to the matters concerning or relating to: (1) the transactions and acts described in subdivisions (a) to (i) of paragraph 2 of said agreement; (2) the claims, charges, transactions and allegations set forth in the amended complaint, the amendments thereto, and the notice to amend and supplement the amended complaint (hereinafter collectively called "amended complaint"); and (3) the Muntz Car Company transactions; and due deliberation having been had on all the foregoing; and

It appearing to the satisfaction of the Court that Rule 23 (c) of the Rules of Civil Procedure has been fully complied with; that due and adequate notice of these proceedings has been given and full opportunity to be heard has been afforded; that said agreement of settlement and compromise was arrived at fairly and in good faith; that the consideration therein provided to be paid to defendant Kaiser-Frazer Corporation is fair, reasonable and adequate; and that said agreement is fair and equitable and in the best interests of said defendant and all of its stockholders; and this Court having duly rendered its opinion containing its findings of fact and conclusions of law and determining that said agreement should be approved.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. That said agreement of settlement and compromise (a copy of which is attached hereto as Exhibit 1 and made a part hereof) be, and the same hereby is, approved and

confirmed; provided, however, that the general release provisions of paragraph 2 of said agreement shall be, and they hereby are, limited to the matters concerning or relating to: (1) the transactions and acts described in subdivisions (a) to (i) of paragraph 2 of said agreement; (2) the claims, charges, transactions and allegations set forth in the amended complaint; and (3) the Muntz Car Company transactions.

2. That the parties to said agreement of settlement and compromise be, and they hereby are, directed to carry out and perform said agreement, and the same is hereby declared to be in full force and effect and binding upon the parties thereto, including defendant Kaiser-Frazer Corporation and each and all of its stockholders. All other provisions of paragraph 1 of said agreement having been performed, payment of the sum of Five Hundred Thousand Dollars ($500,000) to defendant Kaiser-Frazer Corporation pursuant to subdivision (c) of paragraph 1 of said agreement shall be made within ten (10) days after all rights of appeal from this order shall have expired, unless appeal therefrom shall have been taken, in which latter event such payment shall be made within ten (10) days after the date on which this order stands finally affirmed or after the date on which such appeal is finally dismissed.

3. That upon said payment being made to it, Kaiser-Frazer Corporation shall execute, acknowledge and file with the Clerk of this Court its written receipt for said payment, and thereupon this action, forthwith and without further order of the Court, stands dismissed with prejudice and without costs, subject only to reservation of jurisdiction in this Court for the purpose of hearing and determining applications for allowances of fees and expenses and directing the payment thereof and of enforcing the provisions of this order.

Exhibit 3, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

4. That applications for allowances of fees and expenses for plaintiff's attorneys and applications, if any, for allowances of fees and expenses for attorneys for other stockholders be filed and served upon the attorneys for the defendant Kaiser-Frazer Corporation on or before November 10, 1950, and that a hearing thereon be held at such time as this Court may hereafter fix. Said application for fees shall be itemized and accompanied by an affidavit stating with particularity all monies or valuable consideration heretofore received by applicant, his firm, or any member thereof and/or any other person for or in his or its behalf, directly or indirectly, by way of payment of expenses, fees, or for any other purpose in connection with this litigation, and all monies or other valuable consideration promised or expected to be paid to said applicant, his firm, or any member thereof and/or any other person for or in his or its behalf, directly or indirectly, in connection therewith, together with the names and addresses of all persons, firms or corporations who or which have paid, are paying or promise to pay any of such sums or other valuable consideration and that no person, firm or corporation has paid, is obliged to pay, or is expected to pay any money or other valuable consideration to the applicant or any member of any firm of which the applicant is a member except as stated in said affidavit in connection or relating to said above litigation.

Done at Detroit, Michigan, this 13th day of September, A. D. 1950.

FRANK A. PICARD,
United States District Judge.

Exhibit 1 to this order is the agreement constituting part of Exhibit 1 to the moving affidavit.

Exhibit 4, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

Notice of Hearing

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

MICHAEL STELLA, on behalf of himself and all other stockholders of Kaiser-Frazer Corporation,

Plaintiff,

against

HENRY J. KAISER, JOSEPH W. FRAZER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., WALSTON S. BROWN and KAISER-FRAZER CORPORATION,

Defendants.

Civ. No. 45-750.

TO THE STOCKHOLDERS OF KAISER MOTORS CORPORATION (formerly Kaiser-Frazer Corporation):

By order of Hon. , Judge of the United States District Court for the Southern District of New York, dated November , 1953, a hearing will be held in Federal Court at Room 506 of the United States Court House, Foley Square, City, County and State of New York on the day of December, 1953 at o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, upon the defendants' application for summary judgment dismissing the action upon the ground that a settlement agreement approved by the

Exhibit 4, Annexed to Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

United States District Court for the Eastern District of Michigan, Southern Division, constitutes a release and discharge of the claims and causes of action asserted in this action and bars any further proceedings in this action.

A copy of said order and the supporting papers are now on file in the office of the Clerk of said Court.

The aforesaid hearing may be adjourned from time to time without further notice to the parties to this action or to the stockholders of Kaiser Motors Corporation other than the announcement of the adjourned date at the hearing.

Dated: New York, New York
November , 1953.

WILLKIE OWEN FARR GALLAGHER & WALTON
Attorneys for Defendant Kaiser-Frazer Corporation, now Kaiser Motors Corporation.

CORBIN, BENNETT & DELEHANTY,
Attorneys for Defendants Henry J. Kaiser, Joseph W. Frazer, Edgar F. Kaiser, G. G. Sherwood, E. E. Trefethen, Jr., Clay P. Bedford, W. A. MacDonald, O. B. Motter, Hickman Price, Jr., Walston S. Brown.

Affidavit of Alfred Verderosa, with Notice to Stockholders.

Notice to Stockholders

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

MICHAEL STELLA, on behalf of himself and all other stockholders of Kaiser-Frazer Corporation, Plaintiff, *against* HENRY J. KAISER, JOSEPH W. FRAZER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, C. B. MOTTER, HICKMAN PRICE, JR., WALSTON S. BROWN and KAISER-FRAZER CORPORATION, Defendants. Civ. No. 45-750.

NOTICE OF HEARING.

TO THE STOCKHOLDERS OF KAISER MOTORS CORPORATION (formerly Kaiser-Frazer Corporation):

By order of Hon. Thomas F. Murphy, Judge of the United States District Court for the Southern District of New York, dated November 24, 1953, a hearing will be held in Federal Court at Room 506 of the United States Court House, Foley Square, City, County and State of New York on the 10th day of December, 1953 at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, upon the defendants' application for summary judgment dismissing the action upon the ground that a settlement agreement approved by the United States District Court for the Eastern District of Michigan, Southern Division, constitutes a release and discharge of the claims and causes of action asserted in this action and bars any further proceedings in this action.

A copy of said order and the supporting papers are now on file in the office of the Clerk of said Court.

The aforesaid hearing may be adjourned from time to time without further notice to the parties to this action or

to the stockholders of Kaiser Motors Corporation other than the announcement of the adjourned date at the hearing.

Dated: New York, New York, November 25, 1953.

WILLKIE OWEN FARR GALLAGHER & WALTON,
Attorneys for Defendant Kaiser-Frazer Corporation, now Kaiser Motors Corporation.

CORBIN, BENNETT & DELEHANTY,
Attorneys for Defendants Henry J. Kaiser, Joseph W. Frazer, Edgar F. Kaiser, G. G. Sherwood, E. E. Trefethen, Jr., Clay P. Bedford, W. A. MacDonald, O. B. Motter, Hickman Price, Jr., Walston S. Brown.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, }

ALFRED VERDEROSA, being duly sworn, states that he is Advertising Clerk of THE WALL STREET JOURNAL, a newspaper published in the City and County of New York and that the Notice of which the annexed is a copy has been regularly published in the said THE WALL STREET JOURNAL for One (1) insertion 12/2 in the year of our Lord Nineteen Hundred and 53.

ALFRED VERDEROSA

Sworn to before me this
2 day of Dec. 1953

SAMSON TAUBER

SAMSON TAUBER, Notary Public
State of New York No. 03-9289150
Qualified in Bronx County
Certificates filed in the following offices:
County Clerk, New York, Kings
Register: New York, Bronx & Kings

[NOTARIAL SEAL]

PROPOSED Order.

[SAME TITLE.]

Upon the annexed affidavit of Lewis M. Dabney, Jr., verified the 4th day of December, 1953, and all prior proceedings herein, it is

ORDERED, that the return day for defendants' motion for summary judgment herein be adjourned from December 10, 1953, to January 12, 1954, at 10:00 o'clock in the forenoon of that date; and it is further

ORDERED, that answering affidavits shall be served on or before the 8th day of January, 1954; and it is further

ORDERED, that service of a copy of this order and the moving affidavit upon the attorneys of record for the defendant Kaiser-Frazer Corporation, and for the individual defendants herein, on or before Tuesday, December 8, 1953, be deemed good and sufficient service upon said defendants.

Dated: New York, N. Y., December 4th, 1953.

U. S. D. J.

Affidavit of Lewis M. Dabney, Jr., Read in Support of Motion to Adjourn.

[SAME TITLE.]

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

LEWIS M. DABNEY, Jr., being duly sworn, deposes and says:

I am one of the attorneys of record for the plaintiff in the above case, and I make this affidavit in support of a motion to adjourn to a day certain the return day, and the day on which answering affidavits must be served, in response to defendants' motion for summary judgment.

Affidavit of Lewis M. Dabney, Jr., Read in Support of Motion to Adjourn.

This motion was brought on by an *ex parte* order to show cause signed by Honorable Thomas F. Murphy, U. S. D. J., returnable December 10th, and fixing December 8th as the day by which answering affidavits should be served. Plaintiff, for reasons hereinafter stated, requests an adjournment of at least one month as to both of said dates.

This case presents a novel and important question on which there is little or no direct authority, namely, whether a settlement, pursuant to Rule 23(c) FRPC, of a stockholder's derivative action in a different jurisdiction is *res judicata* in the court in which a prior action asserting the same claim was filed and is pending, so as to prevent the trial on the merits of such prior action. Of course, a plea of *res judicata* brings before the court to which it is made the question of just what was decided in the other jurisdiction. The complications of this case are such that adequately to advise the Court, by a documented affidavit, as to all pertinent facts and as to just what was presented and decided in the proceeding leading to approval of the settlement now pleaded as *res judicata*, and adequately to brief and present the applicable law, will require at least a month, taking into consideration the intervening Christmas holidays.

This case is one of a number of stockholders' derivative actions brought on behalf of Kaiser-Frazer Corporation (Kaiser-Frazer) which were involved in the settlement in Detroit which is now pleaded in bar of this action. Such other cases, all of which were brought before the *Pergament* case (settlement of which was approved in Detroit and is now pleaded in bar), are now pending in federal and state courts in different jurisdictions. Counsel for the stockholder plaintiffs in these cases have cooperated, and intend to continue to cooperate, with counsel for plaintiff herein. It is obvious that if the present motion is granted, similar motions will be presented in other jurisdictions. Accordingly, when I was first advised of the present motion, upon my return from out of town to my office on November 30th,

Affidavit of Lewis M. Dabney, Jr., Read in Support of Motion to Adjourn.

I immediately notified my out of town associates in such other cases and requested them to get in touch with their respective clients and with each other, and to advise with me as to whether the motion herein should be resisted. Naturally, such a decision requires a careful examination of the law of *res judicata* as applied in this field, in which apparently few direct precedents exist. Under these circumstances, we all agreed that further time was required in order to decide the course to be recommended to our clients and to obtain their decision.

Thereupon, one of my associates telephoned opposing counsel and requested a month's adjournment in order to determine whether to oppose the motion and, if the determination was to oppose, to prepare answering papers in opposition. Such counsel refused to agree to any adjournment unless he was then and there advised whether there would be opposition—which was, of course, impossible. Accordingly, this application is made.

The following is a bare outline of the facts that will have to be assembled, presented by affidavit, and adequately documented, if it is decided to oppose the motion:

1. This case was one of three cases collectively presenting eight causes of action on behalf of Kaiser-Frazer and against its management arising from various alleged acts of fraud and mismanagement to the detriment of Kaiser-Frazer. Shortly after these cases were filed, the *Pergament* action (settlement of which pursuant to Rule 23(c) is now pleaded in bar) was filed in Detroit by other stockholders. This action set forth, originally and by amendment filed immediately prior to the settlement, all the claims previously set forth in the other stockholder actions. Without notice to plaintiff in these actions, or to their counsel, settlement was made of the *Pergament* action with the declared intention of barring the prosecution of the other actions.

Affidavit of Lewis M. Dabney, Jr., Read in Support of Motion to Adjourn.

2. This settlement was brought on, in Detroit, for approval pursuant to Rule 23(c) by order to show cause. Plaintiffs in the other actions, including the plaintiff herein, appeared and resisted approval of the settlement. Among the grounds which they urged in Detroit, and which will be here urged if it is decided to resist the motion herein, is that the settlement was procured by fraud. In my view of the Detroit proceedings and that of my associates, the effect of the Detroit decision, as modified on appeal, was either that fraud existed, or that the Court did not have to pass, and did not pass, on the issue of fraud. The District Judge, as I read his opinion, refused to find on the matter of fraud. On appeal, one judge found that fraud existed, and the other two judges either agreed there was fraud or found it unnecessary to decide the question. If my view of the Detroit record, including the record on appeal, is correct, the issue of fraud has been determined *adversely* to the defendants or, as a minimum, is open to independent determination by this Court. Naturally, defendants have a different interpretation of the Detroit record; and an adequate presentation of these differences will require careful and elaborate preparation on both sides.

3. The claim in the instant case was settled in bulk with seven other claims presented in two other cases.

* * * * * *

LEWIS M. DABNEY, JR.

Sworn to before me this 4th day of December, 1953.

CARRYL MORITZ
Notary Public.

CARRYL MORITZ
Notary Public, State of New York
No. 03-8020000
Qualified in Bronx County
Certificates filed in the following offices:
County Clerk: Bronx, New York
Register: Bronx, New York
Commission Expires March 30, 1954.

Reply Affidavit of Mark F. Hughes, in Support of Motion for Summary Judgment.

[Same Title.]

State of New York,
County of New York, } ss.:

Mark F. Hughes, being duly sworn, makes this reply affidavit.

The answering affidavit concedes that, in terms, the agreement of settlement approved in the *Pergament* action by the Federal District Court in Michigan and on appeal, releases and discharges the claim asserted in this action. Mr. Dabney asserts, however, that the agreement was obtained by constructive or actual fraud and lack of arm's-length bargaining, that that issue was not determined by the District Court in Michigan and that the plaintiff may raise it now and thus defeat the intended purpose and effect of the settlement agreement and the extended proceedings before the District Court and on appeal approving it.

If the question of fraud and lack of arm's-length bargaining was raised by the plaintiff herein before Judge Picard and determined against him, the opposition to this motion is frivolous and the motion must be granted. Whether that question was raised and decided depends not upon what Mr. Dabney or deponent may say in conflicting affidavits but upon the *record* in the District Court in the *Pergament* case and the *record* on appeal before the Court of Appeals which affirmed the District Court and the *record* before the Supreme Court of the United States when it denied review of the affirmance.

Accordingly, deponent begs leave to refer to and hereby incorporates herein by reference as Exhibit "5" the eleven volumes of the printed record* on appeal in *Pergament*,

* This record slightly condensed the proceedings before the District Court. This affidavit sets forth a few portions of the transcript not in the printed record.

et al. v. *Frazer, et al.*, 203 F. 2d 315, cert. denied October 12, 1953. Deponent will submit a copy of that record to this Court upon the argument of this motion. The attorneys for the plaintiff have a copy.

After the hearings before Judge Picard and before his decision and opinion approving the settlement was rendered, the parties favoring and opposing the settlement submitted briefs. In the Court of Appeals, the parties also filed briefs. Following the affirmance, the plaintiff herein joined with others in a petition to the Supreme Court for a writ of certiorari. Opposing briefs were filed in that Court. These documents supplement the record in each court and further establsh what issues were raised and determined and affirmed in the *Pergament* case. Accordingly, deponent begs leave to refer to and hereby incorporates herein by reference briefs in each of the aforesaid courts with exhibit numbers as follows:

In the District Court.

Brief on Behalf of Plaintiffs as Co-Proponents of the Settlement Agreement of October 25, 1949, Exhibit "6";

Brief on Behalf of Individual Defendants and Defendant, Kaiser-Frazer Corporation, Exhibit "7";

Brief on Behalf of Objecting Stockholders, Exhibit "8";

Reply Brief on Behalf of Plaintiffs, Exhibit "9";

Reply Brief on Behalf of Objecting Stockholders, Exhibit "10".

In the Court of Appeals for the Sixth Circuit.

Appellant's Brief, Exhibit "11";

Brief on Behalf of Appellees, Pergament and London, Exhibit "12";

Reply Affidavit of Mark F. Hughes, in Support of Motion for Summary Judgment.

Brief on Behalf of Defendants-Appellees, Joseph W. Frazer, *et al.*, Exhibit "13";

Appellant's Reply Brief, Exhibit "14".

In the Supreme Court.

Petition for Writ of Certiorari, Exhibit "15";

Brief of Pergament and London in Opposition to Petition for Writ of Certiorari, Exhibit "16";

Brief in Opposition to Petition for Writ of Certiorari on Behalf of Joseph W. Frazer, *et al.*, Exhibit "17";

Reply Brief on Behalf of Petitioners, Exhibit "18";

Reply Brief on Behalf of Respondents, Joseph W. Frazer, *et al.*, Exhibit "19".

These exhibits will be submitted to the Court upon the argument. Plaintiff's counsel has copies.

The mandate of the Court of Appeals on its decision affirming the District Court's order approving the settlement and dismissing the *Pergament* action with prejudice was stayed pending the decision of the Supreme Court on the application for a writ of certiorari. It went down to the District Court for the Eastern District of Michigan shortly after the denial of certiorari and is now on file in the office of the Clerk of that Court. A copy of said mandate is hereto annexed marked Exhibit "20".

As the brief which we shall submit in support of the motion demonstrates in detail, the actual *record* shows (1) that objecting stockholders including the plaintiff herein and his counsel raised and litigated the charge that the settlement agreement was not arrived at by arm's-length bargaining in good faith, (2) that the District Court considered that charge and ruled against the objectants, finding that there was no "collusion, fraud, concealment or unfair dealing in arriving at the compromise" and

that "there was 'arms-length bargaining'" (Pergament Record, Vol. 1, pp. 240, 242; 93 F. Supp. 13, 21), (3) that the Court of Appeals for the Sixth Circuit affirmed that determination, and (4) that, despite the repetition of the charge in the petition for a writ of certiorari, the Supreme Court denied the petition. In an attempt to support its present claim that that charge was not determined, the answering affidavit relies upon and cites copiously from a *dissenting* opinion in the Court of Appeals. It is impossible to understand how the answering affidavit can allege (Answering Aff. p. 7) that "as regards fraud, the District Judge failed to make findings * * *" in the light of the foregoing quotations from his opinion and the recital in his order "that said agreement of settlement and compromise was arrived at fairly and in good faith" (Hughes' Aff. Ex. 3, p. 2; Pergament Record, Vol. 1, p. 291).

On one occasion during the hearings before Judge Picard, Mr. Dabney made the following statement which was not included in the printed record:

> "Now the necessary effect of the settlement in this case, if there is a settlement, is to destroy the Stella action. There is no sense to it otherwise."
>
> (Stenographic transcript of proceedings before Picard, J., p. 469.)

In the Court of Appeals, counsel for these same objectants stated, "the settlement approved below will forever release the defendants from their wrongdoing * * *" (Transcript of Argument, Court of Appeals, 2/20/52, p. 5).

The answering affidavit laboriously argues that in approving the settlement the District Court was acting in an administrative rather than a judicial capacity (Answering Aff., pp. 8, 13-28). Deponent believes that it is not the proper function of this replying affidavit to deny item by item the misstatements and misinterpretations of, and omissions from the record in the course of the answering affidavit. The *record* itself plainly shows that the propo-

nents of the settlement invoked the Court's jurisdiction and power under Rule 23(c) of the Rules of Civil Procedure and that the District Court entertained their application and proceeded to a determination thereon pursuant to the jurisdiction and duty imposed upon it by that Rule and approved the settlement only after being satisfied that that Rule had been fully complied with (Pergament Record, Vol. 1, pp. 148, 291; Hughes' Aff., Ex. 1, p. 5, Ex. 3, p. 2). It also shows that the criticims of the way in which the District Judge conducted the proceedings are but repetitions of similar criticisms in the *Pergament* record and briefs (Ex. 11, pp. 167-175).

The answering affidavit (pp. 29-30) attempts to raise upon this motion the adequacy of the settlement. This, of course, was one of the issues raised and passed upon both in the District Court and on appeal in the *Pergament* case (Pergament Record, Vol. 1, pp. 174-6, 216-7, 247-256, 296-8; Ex. 8, pp. 127-145; Ex. 11, pp. 147-160). It cannot be re-litigated.

Following the entry of the order approving the settlement, counsel for the objectants, including the plaintiff herein, filed an application for an allowance for their services in opposing the approved settlement and for their expenses and disbursements allegedly amounting to $39,524.05. After denial of certiorari by the Supreme Court, they filed a supplemental application for fees. If, as plaintiff now contends on this motion, the proceedings before Judge Picard and on appeal, have not had the effect of barring further prosecution of this and the other stockholders' actions and were meaningless and ineffective, their counsel could not properly ask for compensation and reimbursement for the enormous amount of time and expense which they spent and incurred in opposing the settlement agreement on the merits. In this connection, their application alleges in part:

> "• • • they are the attorneys for the aforementioned objecting stockholders, whose derivative

> suits are being disposed of by the settlement herein, and they have participated in the instant proceedings in addition to conducting their own suits. * * *"
>
> (Application of Messrs. Schofield, *et al.* for compensation and reimbursement of expenses, p. 2.)

In their supplemental application the following statement appears (p. 1):

> "Among the more important issues decided by this Court [the District Court in Michigan], were the question of the propriety of the settlement negotiations, * * *"

While the plaintiff will scarcely dispute it, it is perhaps well to point out that following the denial of the petition for a writ of certiorari, the sum of $500,000 provided for in Section 1(c) of the settlement agreement was paid and receipted for as required by paragraph 3 of Judge Picard's order approving the settlement. Annexed hereto marked Exhibit "21" is a true copy of the receipt filed in the office of the Clerk of the District Court in Michigan. In accordance with the provisions of the order (Hughes' Aff., Ex. 3, p. 3) the *Pergament* action "stands dismissed with prejudice."

WHEREFORE, deponent prays that the defendant's motion for summary judgment be granted.

MARK F. HUGHES.

Sworn to before me this 7th day of January, 1954.

MAE J. CANNON
Notary Public, State of New York
No. 24-5595500
Qualified in Kings County
Certs. filed with Co. Clk's.
N. Y., Bronx, Queens, and
Register: Kings, N. Y., Bronx, Queens
Term Expires March 30, 1954.

Exhibit 20, Annexed to Reply Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable, the Judges of the United States District Court for the Eastern District of Michigan—Greeting:

WHEREAS, lately in the United States District Court for the Eastern District of Michigan, before you or some of you, in a cause between Jerome R. Pergament and George J. London, suing on their own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated and in the right of and on behalf of Kaiser-Frazer Corporation, Plaintiffs, and Joseph W. Frazer, Henry J. Kaiser, *et al.*, Defendants, (D. C. No. 7354, Civil), an order was entered on the 13th day of September, 1950 approving compromise and settlement and dismissing action,

AND WHEREAS, the said James F. Masterson, Michael Stella, Eva Lefker and Otis & Co., appealed to this court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Sixth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

AND WHEREAS, in the present term of October, in the year of our Lord, one thousand nine hundred and fifty-one, the said cause came on to be heard before the said United States Court of Appeals for the Sixth Circuit, on the said transcript of record, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

YOU, THEREFORE, ARE HEREBY COMMANDED that such proceedings be had in said cause, in conformity with the opinion

Exhibit 20, Annexed to Reply Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

WITNESS the Honorable Earl Warren, Chief Justice of the United States, the sixteenth day of October in the year of our Lord one thousand nine hundred and fifty-three.

CARL W. REUSS
Clerk, United States Court of Appeals
for the Sixth Circuit

Costs—(None)

Exhibit 21, Annexed to Reply Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

UNITED STATES OF AMERICA

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

JEROME R. PERGAMENT and GEORGE J. LONDON, suing on their own behalf and on behalf of all other stockholders of Kaiser-Frazer Corporation similarly situated and in the right of and on behalf of Kaiser-Frazer Corporation,

Plaintiffs,

vs.

JOSEPH W. FRAZER, HENRY J. KAISER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., GRAHAM-PAIGE MOTORS CORPORATION, OTIS & CO., CYRUS EATON, THE PERMANENTE METALS CORPORATION, PERMANENTE PRODUCTS COMPANY, UNITED STATES OF AMERICA, RECONSTRUCTION FINANCE CORPORATION and KAISER-FRAZER CORPORATION,

Defendants.

Civil No 7354

Receipt

Kaiser Motors Corporation (formerly known and designated herein as Kaiser-Frazer Corporation) hereby

Exhibit 21. Annexed to Reply Affidavit of Mark F. Hughes, Read in Support of Motion for Summary Judgment.

acknowledges receipt of the sum of Five Hundred Thousand Dollars ($500,000) from Kaiser Aluminum & Chemical Corporation (formerly known and designated herein as The Permanente Metals Corporation), said amount being paid and received pursuant to the provisions of the Order Approving Compromise and Settlement and Dismissing Action made and entered herein on September 13, 1950, and pursuant to that certain Agreement dated October 25, 1949, which was approved by said Order.

Dated: November 5, 1953.

KAISER MOTORS CORPORATION
(formerly KAISER-FRAZER CORPORATION)

By (sgd) S. A. GIRARD
Its Vice President

(SEAL)

True Copy

STATE OF MICHIGAN }
COUNTY OF WAYNE } ss.:

On this 5th day of November, 1953, before me, appeared S. A. GIRARD to me personally known, who, being by me duly sworn, did say that he is the Vice President of Kaiser Motors Corporation (formerly Kaiser-Frazer Corporation); and that the seal affixed to said instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said S. A. GIRARD acknowledged said instrument to be the free act and deed of said corporation.

(sgd) PATRICIA FLAHERTY
Notary Public in and for said
County and State

My Commission Expires: Jan. 21, 1956

Supreme Court of the United States

2112

PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT. MOTION FOR LEAVE TO FILE, and PETITIONS FOR WRITS OF MANDAMUS AND PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, THE HONORABLE BEN H. RICE, JUDGE OF THE SAME, THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, LAREDO DIVISION AND JUDGE JAMES V. ALLRED, JUDGE OF THE SAME.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No.

GEORGE B. PARR, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

GEORGE B. PARR, *Petitioner*

v.

BEN H. RICE, District Judge, *Respondent*

No. Misc.

GEORGE B. PARR, *Petitioner*

v.

BEN H. RICE, District Judge, *Respondent*

GEORGE B. PARR, *Petitioner*

v.

JAMES V. ALLRED, District Judge, *Respondent*

MOTION FOR LEAVE TO FILE PETITION FOR WRITS OF MANDAMUS AND PROHIBITION

The petitioner moves the Court for leave to file the petition for writs of mandamus and prohibition hereto annexed; and further moves that an order and rule be

entered and issued directing the Honorable The United States District Court for the Western District of Texas, Austin Division, and the Honorable Ben H. Rice, Judge of the United States District Court for the Western District of Texas, Austin Division, and the Honorable The United States District Court for the Southern District of Texas, Laredo Division, and the Honorable James V. Allred, Judge of the United States District Court for the Southern District of Texas, Laredo Division, to show cause why writs of mandamus and prohibition should not be issued against them in accordance with the prayer of said petition, and why your petitioner should not have such other and further relief in the premises as may be just and meet.

THURMAN ARNOLD

ABE FORTAS
1229 - 19th Street, N. W.
Washington 6, D. C.
Counsel for Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No.

GEORGE B. PARR, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

GEORGE B. PARR, *Petitioner*

v.

BEN H. RICE, District Judge, *Respondent*

No. Misc.

GEORGE B. PARR, *Petitioner*

v.

BEN H. RICE, District Judge, *Respondent*

GEORGE B. PARR, *Petitioner*

v.

JAMES V. ALLRED, District Judge, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR WRITS OF MANDAMUS AND PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, THE HONORABLE BEN H. RICE, JUDGE OF THE SAME, THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, LAREDO DIVISION AND JUDGE JAMES V. ALLRED, JUDGE OF THE SAME.

A. OPINIONS BELOW

The opinion of the Court of Appeals is not yet officially reported. It appears hereinafter at A. 16. The memorandum opinion of Judge Kennerly transferring the first indictment to Laredo appears hereinafter at A. 1. The oral opinion of Judge Kennerly dismissing the first indictment appears hereinafter at A. 13.

B. JURISDICTION

The jurisdiction of this Court is based on 28 U.S.C. 1254 (1) and 28 U.S.C. 1651. The judgment of the Court of Appeals dismissing the appeal in *Parr* v. *United States* and denying the writs in *Parr* v. *Rice* was rendered on July 13, 1955 (R. 272).

C. QUESTION PRESENTED

When the United States Attorney obtains an indictment in a venue where the defendant cannot get a fair trial and for that reason the court on motion of defendant, following consideration of evidence and a hearing, transfers the case to a venue where he finds neither side will be at a disadvantage, does the United States Attorney have the privilege of avoiding trial in the division to which the case has been transferred by dismissing the transferred indictment and obtaining another indictment charging the identical offense in another venue?

D. FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED

"Rule 21. Transfer from the District or Division for Trial

"(a) For Prejudice in the District or Division. The court upon motion of the defendant shall transfer the proceeding as to him to another

district or division if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division.

"(b) Offense Committed in Two or More Districts or Divisions. The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and *if the court is satisfied that in the interest of justice the proceeding should be transferred* to another district or division in which the commission of the offense is charged.

"(c) Proceedings on Transfer. When a transfer is ordered the clerk shall transmit to the clerk of the court to which the proceeding is transferred all papers in the proceeding or duplicates thereof and any bail taken, *and the prosecution shall continue in that district or division.*" (Emphasis supplied).

* * * * * *

"Rule 48. Dismissal.

"(a) By Attorney for Government. The Attorney General or the United States attorney may *by leave of court* file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant." (Emphasis supplied).

E. STATEMENT OF THE CASE

I. The Procedure In This Court

Succinctly stated, this case involves the transfer of a criminal indictment, brought originally in Corpus Christi, to Laredo on order of the court, the subsequent indictment of petitioner in Austin and the dismissal by the prosecution of the original, transferred indictment.

(a) Petitioner sought relief in the Court of Appeals for the Fifth Circuit against this evasion of the transfer order and the terms of Rule 21, (1) through appeal of the Laredo dismissal and (2) prerogative writs directed to the Austin court. The appeal was dismissed and the writs refused below. He now seeks ordinary certiorari from this judgment.

(b) Petitioner also seeks, in the alternative, the issuance of prerogative writs by this Court (1) to the Laredo court, to reverse the dismissal order, and (2) to the Austin court, to require it to transfer the second indictment back to Laredo.

This statement is intended to serve simultaneously as petition for the writ of certiorari and as petition for the prerogative writs.

II. The Facts

This case involves a unique and unprecedented attempt by the Government to circumvent a valid and effective order of transfer entered by a court under the provisions of Rule 21 of the Federal Rules of Criminal Procedure.

Petitioner Parr is a prominent political figure in the State of Texas. For some years prior to the

institution of this proceeding, he had been subjected to heated newspaper attacks on his honesty and character, particularly in the Corpus Christi Division of the Southern District of Texas. On November 15, 1954, an indictment was returned in that Division, charging petitioner in three counts with evasion of income taxes (R. 4).

Petitioner filed a Motion under Rule 21(a) of the Federal Rules of Criminal Procedure to transfer that indictment on the ground that he could not obtain a fair and impartial trial at Corpus Christi. The Government vigorously contested the change from Corpus Christi. It offered voluminous affidavits in opposition to a transfer to Laredo. (R. 27). The Corpus Christi court held extensive hearings on the motion. On April 27, 1955, it filed its opinion (per Kennerly, D.J., approved by Allred, D.J.) (R. 16-35), specifically finding that (R. 28):

> "A preponderance of the evidence reflected by such affidavits—and I have no doubt on the subject and find—*that there exists in the Corpus Christi Division of the Court so great a prejudice against Defendant that he cannot obtain a fair and impartial trial in this case in such division.*" (Emphasis supplied).

It transferred the case to the Laredo Division (R. 53), finding specifically that trial in that division would in no way prejudice the Government (R. 35):

> "Basing my findings, as I must, wholly on all the affidavits *I do not think that the evidence shows that the Government either will or might 'be under a severe handicap' in the prosecution of this case as claimed.* I find to the contrary." (Emphasis supplied).

The Government did not seek review of this order. However it soon became apparent that it had no intention of conforming to the court's decision that trial should go forward in Laredo. On May 3, six days after this opinion was filed (and actually prior to the formal entry of the transfer order [R. 53]), the Assistant Attorney General telegrammed the local United States Attorney that he was authorized to dismiss the indictment if an identical indictment could be obtained in Austin (R. 36). On the same day, the United States Attorney obtained an indictment from the Grand Jury, sitting in the Austin Division of the Western District of Texas, in all respects identical with the indictment which had been transferred. It was in three counts, charging evasion of income taxes; like the first, it alleged the filing of false returns in Austin (R. 37 et seq.). The very next day, the United States Attorney moved the Laredo court to dismiss the original, transferred indictment under Rule 48(a) of the Federal Rules of Criminal Procedure. In support of its motion, as required by Rule 48(a), the Government filed its statement of reasons. It pointed out that it had originally chosen to prosecute petitioner in Corpus Christi, that the decision was made prior to the transfer order to Laredo and that "the recent decision of the Court to transfer venue from Corpus Christi to Laredo . . ." had disturbed the prosecution's "over-all appraisal" of the strategy of the proceeding (R. 42, 43). Laredo, it reiterated, was unsatisfactory to the United States.

> "*The Attorney General believes* that prosecution should be had in the Western District of Texas and has initiated action accordingly." (R. 42). (Emphasis supplied).

The Laredo court ordered that petitioner be served with the Motion and be given an opportunity to be heard (R. 49-51). On May 16 Judge Kennedy conducted an extensive inquiry into the grounds for the dismissal, and heard testimony by Government counsel (R. 82-129).

The principal grounds on which the Government asked the Laredo court to approve dismissal of the indictment were as follows (R. 114):

> . . . the very fact that the case in the Southern District has now been transferred to Laredo and the fact that testimony will have to be elicited from witnesses who are either reluctant or hostile makes—throws a little different light on the Government's put on of venue, as it does on the Government's proof of other aspects of the case. I point out to you in that regard that Mr. Brown here, who was in the employ of Mr. Parr and signed the tax returns, was an employee of Mr. Parr, and he has lived down in that area. I'm going further into the case, but the change in the location affects the proof as to venue as it does the other facts of the Government's case.

Later in the Record, the Government summarized its position as follows (R. 115):

> "I think it has been very clear from several documents we have filed that we would have preferred the case to remain in Corpus Christi, and it is certainly clear from the action of the Attorney General and myself that the Government prefers that the case go to Laredo, and believes, in the exercise of his office as the chief prosecutor, it ought to be prosecuted there in Austin." (Emphasis supplied.)

titled and can dispense justice which will be effective and not sterile."

Judge [illegible] concurred upon the importance of the question stated as follows, [illegible]:

"... I would not state my reasons for dissent if I did not feel that this record presents an important question of procedure whose protection appellant is entitled to invoke and whose definition the bench and bar are entitled to have. It is the duty of the courts to hold the scale of justice in equal balance between the Government and a citizen charged with crime in exactly the same manner as those scales are held in litigation between two private individuals."

G. ARGUMENT

I. The Government May Not Circumvent Rule 21 and an Order of Transfer Entered After Hearing, by Re-indictment and Dismissal of the Transferred Indictment.

(a) Rule 21 and the Order of the Corpus Christi Court Required that the Prosecution Go Forward In Laredo.

We agree with the dissenting judge that this case presents a highly important question of the administration of justice under the Federal Rules of Criminal Procedure.[1] It breaks new ground. We have found no precedent in the reported federal cases of a United States Attorney reversing and evading a valid and effective order of transfer by dismissing the transferred indictment and instituting a second in another district charging the identical offense. Such

[1] Compare the issuance of certiorari in such cases as *Upshaw v. United States*, 335 U.S. 410 (1948) (Rule 5) and *United States v. Smith*, 331 U.S. 469 (1947) (Rule 33).

a procedural innovation is a fundamental evasion of the purpose of Rule 21(a) and of the court's order entered pursuant to the terms thereof, violates the plain meaning of Rule 21(c) and deserves the condemnation of this Court.

Our position on the merits may be shortly stated. The prosecution originally indicted petitioner in Corpus Christi for income tax evasion. Petitioner moved for a transfer of the proceeding under Rule 21(a) of the Federal Rules of Criminal Procedure on grounds that he would be denied a fair trial in Corpus Christi. Following a hearing and adjudication of the prejudice against petitioner in Corpus Christi *and absence of any "handicap" to the Government in Laredo*, the district court transferred the proceeding.

Rule 21(c) of the Federal Rules of Criminal Procedure provides as follows:

> "When a transfer is ordered the clerk shall transmit to the clerk of the court to which the proceeding is transferred all papers in the proceeding or duplicates thereof and any bail taken, *and the prosecution shall continue in that district or division.*" (Emphasis supplied)

This rule must mean what it says—that once the valid transfer of the Corpus Christi indictment was entered "the *prosecution* shall continue in [the Laredo] division"—and not in some other place. That order was conclusive as to the place of prosecution. The Government might have sought review of this action by mandamus and prohibition in the appellate court, but it did not do so. The order of the Corpus Christi Court, entered after hearing, constituted its

decision as to the place of trial and was final under Rule 21(c). "The prosecution" was required to "continue in that division".

The reindictment of petitioner in Austin and the dismissal of the transferred order constitutes a technique for escaping the consequences of this order which is procedurally indefensible. There is no support for it in the Rules. We have found no federal case reporting such a strategem in the past. Furthermore, the practice has been severely criticized in decisions of state courts. In *Ex Parte Lancaster*, 206 Ala. 60, 89 So. 721 (1921), defendant was indicted for murder in Walker County and, on his motion asserting prejudice, the court transferred the proceeding to Marion County. The prosecution then dismissed the indictment in Marion County and obtained a new indictment in Walker County. The Supreme Court issued a writ of prohibition forbidding the trial of the defendant in Walker County under the second indictment. It said (89 So. at 724/725):

> "Neither the Constitution nor the statutes of Alabama authorize the state to apply for or to secure a change of venue in any criminal case. Will the courts allow the state to secure a change of venue indirectly when it is not permitted directly to do so? What cannot be done directly by law, the law does not permit to be done indirectly. No change of venue can be granted by a court in a criminal case, except on application, petition, or motion of the defendant. The defendant must be the moving party for the change of venue, and not the state.
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> * * *
>
> "To give the state this right to have the trial returned to Walker County would deprive the

defendant of his right to be tried in Marion County for this offense. This would allow the state a change of venue, if permitted. The defendant cannot be deprived of this right to be tried in Marion county by motion of the state for a nolle prosequi to be entered, which is granted by the court. Neither the Constitution nor the statutes of Alabama ever contemplated that the defendant could in that way be deprived of his right of trial for the offense charged in Marion county. *To permit it, the state, with the approval of the court, by entering a nolle prosequi, could accomplish indirectly what the statute directly forbids, namely, a change of the trial of the defendant on the offense charged* from Marion back to Walker county, or some other county, perhaps.

"*The court cannot approve or encourage or permit such practice.* It will set no such precedent. It cannot permit a defendant to be liable to be harassed in that way." (Emphasis supplied).

We submit that Rule 21 compels a similar result here. Rule 21(*e*) requires the "prosecution" to "continue" in the transferee forum and thus, by operation of its plain terms, prohibits trial elsewhere on the charge. In the practice of the majority of states a transfer of venue by the court similarly invests the transferee court with exclusive jurisdiction.[4] The provision of Rule 21 makes clear that the rule was designed to conform federal practice to this aspect of state procedure. The prosecution cannot use the technique of

[4] See e.g. *Turner v. State*, 87 Fla. 155, 99 So. 334, 336 (1924); *Krafe v. District Court*, 16 Wyo. 381, 94 Pac. 459, 461 (1908).

dismissal to collaterally reverse a valid transfer order having this effect. *Ex parte Lancaster*, supra.

We must assume that the ordinary prosecutor, when trying a cause célèbre, will brush aside all consideration of fairness to the defendant in initially selecting a forum. It is obviously impossible for the court to interfere with his choice before the indictment is brought. Protection is accorded the defendant by Rule 21. But having made his initial choice of an unfair venue, in all conscience the prosecutor should be bound to try the case in the forum which the court decides, on defendant's motion to transfer, is a fair one to both sides. Otherwise the prosecutor can make a succession of choices. He may begin with the worst venue; if the case is transferred, retransfer the prosecution to the next most prejudiced by the device of dismissal, and so on.

This is a transparent technique for evading the consequences of a valid transfer order. The same judge would have conducted the trial, whether it went forward in Corpus Christi or in Laredo. The prosecution's preference for Corpus Christi must have been due to its desire to avail itself of the prejudice there. Then, after the court found that neither side would be prejudiced by trial in Laredo, prosecution decided to circumvent this finding and again to insist upon a forum of its own choice. Such shopping around, for an illegitimate advantage should not be sanctioned by this Court.[5]

[5] See also *Coleman v. State*, 83 Mis. 290, 35 So. 937 (1904); *State v. Milano*, 138 La. 989, 71 So. 131 (1916).

[6] The language of *Hampton v. Williams*, 33 F. 2d 46, 49 (8th Cir. 1929) is appliable here.

> "Congress did not intend that a party could voluntarily proceed in the court where the suit was filed until he became dissatisfied and then transfer the case. It gave the other court as he desired, but he could not experiment with both."

The sole argument made by the Government below, in answer to our substantive point, was that to outlaw dismissals by the prosecution as a technique for overruling a valid transfer order by the court would give the defendant the ultimate choice of venue and permit him to force trial in a "chosen sanctuary." (R. 268).

The answer to this claim of injustice to the Government is that the Government had all that it is entitled to ask for—a fair place of trial. It originally sought an unfair advantage in Corpus Christi. That advantage had been taken away by the change to Laredo. If as a result of an attempt to pick an unfair forum it has lost the chance to prosecute at Austin, the Government has learned the risks of an original unfair choice.

It cannot now be heard to argue that the District Court's order moved the trial to defendant's "chosen sanctuary", and that this constitutes an inequity to the Government justifying the extraordinary procedural innovation here. The proper way to test whether the court could have transferred to a forum other than Laredo was by mandamus in the Court of Appeals,[7] not by what was in effect a retransfer by the

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[7] Much the same situation was presented in *United States* v. *United States District Court*, 209 F. 2d 575 (6th Cir. 1954), where the court considered the propriety of a transfer order under Rule 21(b) of a similar indictment from the District in which the allegedly false return was filed to that in which it was prepared. The court held that (*id.* at 576):

> "Mandamus or a proceeding in the nature of mandamus is the appropriate procedure by which to decide the issue presented."

See also *General Portland Cement Co.* v. *Perry*, 204 F. 2d 316 (7th Cir. 1953); *Paramount Pictures* v. *Rodney*, 186 F. 2d 111 (3d Cir. 1951), cert. den. 340 U.S. 953 (1951).

Government. Rule 21 prohibits the Government from requesting a transfer, either on grounds of prejudice or "in the interests of justice"; it also makes no provision for a motion by the prosecution for retransfer after a transfer is once ordered on defendant's motion. The Notes of the Advisory Committee demonstrate that transfer, where justified, is a privilege to be accorded defendants, not the Government.[1] The prosecution here, however, sought to invest itself with a transfer power. It attempted to circumvent the valid order of the Corpus Christi court, entered after elaborate hearings and a decision as to the suitability of Laredo to both sides. It cannot justify a plain evasion of the terms of Rule 21(c) and the order of transfer by claiming an inequity which could have been tested by ordinary appellate remedies.

(b) The Prosecution May Not Use the Device of Dismissal Under Rule 48 to Secure a Transfer, and the Laredo Court Abused Its Duty in Granting the Dismissal Motion Admittedly Made for this Purpose.

After the Corpus Christi Court indicated it would grant defendant's transfer motion, the Government secured a second indictment in Austin for the purpose of circumventing its ruling, and moved in Laredo to dismiss the transferred indictment. Judge Kennerly set the dismissal motion down for argument and held an extensive hearing. During the course of that hearing, in the Statement of Reasons filed by the Government, and during the testimony of Government counsel, it was apparent to and acknowledged by both sides and the court that the sole reason for the dismissal

[1] The Notes of the Advisory Committee on the Rules state:

> "3. The rule provides for a change of venue only on defendant's motion and does not extend the same right to the prosecution . . . ." 18 U.S.C.A. Rule 21.

was the Government's determination to disregard the order setting Laredo as the place for trial under the federal rules, that it had secured an identical new indictment in Austin and that it had resorted to this stratagem only because the court had transferred the case from Corpus Christi.

Rule 48(a) provides that the United States attorney may secure a dismissal only "by leave of court". Prior to the adoption of this rule in 1944, of course, the prosecution had an unfettered option to dismiss. The new rule was intended to reverse this practice. It contemplated that district courts to whom such motions were addressed should exercise a supervisory power over dismissals. The notes of the Advisory Committee are illuminating:

> "The first sentence of this rule will change existing law. The common-law rule that the public prosecutor may enter a nolle prosequi in his discretion, without any action by the court, prevails in the Federal courts. . . This provision will permit the filing of a nolle prosequi only by leave of court. This is similar to the rule now prevailing in many States.". 18 U.S.C.A. Rule 48.

Clearly the Rule contemplates that the court is to assume more than a passive role in approving dismissals. The Government's motion must receive *the sanction of the court.*[9]

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[9] See *United States* v. *Doe*, 101 F. Supp. 609 (D. Conn. 1951), wherein Judge Hincks denied such a motion on the ground that the Government had not shown the reasons for dismissal. He said (*id.* at 611):

> "In my view, the rule contemplates that the court shall exercise a sound discretion in the premises. And on fundamental principles, at least in the absence of very exceptional circumstances as for instance where the defendant has received

As the dissenting judge in the Court of Appeals demonstrated, Judge Kennerly failed to recognize his obligations under the new rules. He stated that he had always during his 24 years on the bench granted motions to dismiss. He felt that if he had "discretion", he "must exercise" it and "allow" the indictment to be dismissed (R. 162). Passive approval of the dismissal here constitutes plain error.

Further, approval of the dismissal, whether as a result of conscious and responsible exercise of discretion or not, was also error. The court should not have allowed the Government to exploit the dismissal device in this fashion. Rule 21(a) provides a mechanism for real, and not sham, transfers of criminal indictments. The power and responsibility for decision which it invests the courts is not subject to be overridden by the Attorney General and his minions. Rule 21(*c*) required that the prosecution go forward in Laredo, if at all. The court was told that the only reason for the Laredo dismissal was to permit trial in Austin. The Corpus Christi court had already held that Laredo would be fair for both sides. It had rejected the Government's contention, pressed at the hearing on the transfer motion, that Laredo would be unsuitable as a place of trial. The Government's subsequent dismissal motion was based on the very same

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a substantial sentence for another phase of the same offense, *the court may not properly approve a dismissal of the entire case against any given defendant unless satisfied that the government lacks sufficient evidence to warrant a prosecution.* Especially is this so where the matter is before the court on indictment as distinguished from information." (Emphasis supplied).

See also Proceedings of the Institute on Federal Rules of Criminal Procedure (1945), 5 F.R.D. 150, 197, 201-202, 248-249.

argument. It was an attempt to relitigate the issue. The Laredo court was bound to deny any motion to dismiss based on this reason. Final decisions of courts, entered upon evidence and after argument, may not be circumvented in this fashion. The Government could not transfer the case from Laredo and a dismissal admittedly requested for that purpose should not have been approved.

II. This Court Can Grant Full Relief.

Petitioner here has applied both for ordinary certiorari to correct the error of the Court of Appeals, and for the prerogative writs of mandamus and prohibition to be directed to Judges Allred and Rice requiring them, respectively, to reverse the Laredo dismissal and to order transfer to Laredo of the Austin indictment. This Court can grant full relief. It has four alternatives. It may:

(a) Order the dismissal in Laredo reversed, either (1) through the petition for certiorari from the Court of Appeals' dismissal of the appeal from Laredo, or (2) by the issuance of original prerogative writs directed to the Laredo court, or;

(b) Order the Austin indictment dismissed or transferred back to Laredo, either (3) through the petition for certiorari from the Court of Appeals' judgment refusing the writs prayed for there, or (4) by original prerogative writs directed to the Austin court.

(a) Relief From the Laredo Dismissal.

(1) By Certiorari: The Court of Appeals should have considered the merits of the appeal and entered its judgment reversing the Laredo dismissal. We have set out our contentions on the merits above. It is

apparent that the Court erred in not reaching them. It avoided decision on these important issues by holding that it had no jurisdiction of the appeal from the dismissal in the Laredo court because not a final order. We submit the court did have jurisdiction.

We are unable to understand the reasoning of the court when it bases its refusal to consider the merits of the appeal from Judge Kennerly's order of dismissal on the sole ground that it was not final. Section 48(a) is in the following language:

> "The Attorney General or the United States Attorney may by leave of court file a dismissal of an indictment, information or complaint and the *prosecution shall thereupon terminate.*". (Emphasis supplied).

The Court of Appeals, however, appeared to think that the order of dismissal did not terminate the proceeding. In effect, it treated the second indictment in Austin and the dismissal of the first indictment in Laredo as *equivalent, for appeal purposes, to* a motion for transfer made by the Government. The dismissal clearly was not an order of transfer. It could not be. The Government has no power to move for a transfer under any circumstances, as we have shown; the Court has no power to approve a transfer on the Government's motion. The order of dismissal was clearly a "final" order. It terminated the prosecution which had began with the indictment obtained in Corpus Christi.

In these circumstances the order of dismissal was appealable because of the prejudice to the defendant in permitting the prosecution to select an alternative forum in plain disregard of the order which had been entered by the Corpus Christi Court after an elaborate hearing, submission of briefs, and findings as to the suitability of Laredo as a place for trial.

(2) By Original Prerogative Writs: In addition, even if the order dismissing the indictment was not a final order, relief may be granted by the issuance of original prerogative writs ordering the Laredo court to expunge the dismissal order from the record. The writs are justified and called for here because of the error of the district court in granting the dismissal for the reasons submitted by the prosecution, which constituted a plain attempt to evade and circumvent the valid transfer order and the terms of Rule 21, and its failure to exercise the responsibility imposed by Rule 48(a).

(b) *Relief from the Austin Refusal to Dismiss or Transfer Back to Laredo.*

(3) By Certiorari: Petitioner requested the court below to issue writs of mandamus and prohibition requiring the Austin court to transfer the second indictment to Laredo, or to dismiss.

The transfer motion was made under Rule 21(*b*), permitting transfers in the "interests of justice." We submit that it was error for the Austin court not to retransfer the case. Plainly it is in the interests of justice to hold the prosecuting attorney rigorously to the Rules of Criminal Procedure. The second indictment in Austin was a transparent attempt to reverse, by the fiat of the United States attorney, a valid order of transfer entered by the court and entitled to finality under Rule 21(*c*). The Austin court abused its duty in the matter by not ordering the indictment to be transferred to Austin and requiring the prosecution to proceed in the division to which it had been originally sent by the court.

Writs of mandamus and prohibition, either to compel transfer to Laredo or dismissal of the Austin in-

dictment, were proper in the Court of Appeals. They were the only method of reviewing the Austin court's refusal to dismiss or transfer. Petitioner will not be able to claim that trial in Austin was improper on appeal from convictions. As stated in *Ford Motor Co. v. Rygin*, 182 F. 2d 329, 330 (2d Cir. 1950), cert. den. 340 U. S. 841 (1950), involving mandamus to review refusal to grant a transfer under 28 U.S.C. (1946 ed.)

> "Judge Hand and I [Judge Frank] think this the kind of interlocutory order with which this court can properly deal by way of such a writ, since should petitioners—the defendants—finally lose on the merits below, any error in the interlocutory order would probably be incorrectible on appeal, *for petitioners could hardly show that a different result would have been reached had the suit been transferred . . .*" (Emphasis supplied).

(4) By Original Prerogative Writs: This court has power, as an original matter, to grant the writs of prohibition to correct the error of the Austin court in allowing the second indictment to stand for trial there, and should compel it to dismiss the second indictment or to transfer its trial to Laredo. 28 U.S.C. 1651.

The relief prayed for from the court is, of course, alternative. The result sought by petitioner is to require that the Government proceed with the trial of this case in Laredo, the venue fixed by order of the District Court in Corpus Christi after full consideration of the evidence and argument. If this relief is not granted, and if the Government's tactics in this case are successful, the effect will be to rewrite Rules 21(a) and (b) to provide that if the court determines the prose-

Memorandum Opinion

(Judge T. M. Kennerly).
(Filed April 28, 1955.)

Caption Omitted

MALCOLM R. WILKEY, United States Attorney, and JAMES T. DOWD, Assistant United States Attorney, of Houston, Texas; for Plaintiff.

EVERETT J. LOONEY, of Austin Texas, THOMAS JAMES, of Austin, Texas, MARVIN K. COLLIE, of Houston, Texas, and CLYDE L. WILSON, JR., of Houston, Texas; For Defendant.

April 27, 1955.

MEMORANDUM

The Defendant, George B. Parr, is charged by indictment in this court with having made false and fraudulent income tax returns for the years 1949, 1950 and 1951.

There have been assigned to me for hearing four motions in the case. These have been heard under Local District Court Rule 25, and are disposed of as follows:

1. *Defendant's Motion for Bill of Particulars filed January 3, 1955, under Rule 7(f) of the Federal Rules of Criminal Procedure, reading as follows:*

> "(f) Bill of Particulars. The court for cause may direct the filing of a bill of particulars. A motion for a bill of particulars may be made only within ten days after arraignment or at such other time before or after arraignment as may be prescribed by rule or order. A bill of particulars may be amended at any time subject to such conditions as justice requires."

(a) I think the Government's answers to Paragraphs I, II, III and IV, of Defendant's Motion for Bill of Particulars require that such paragraphs of such Motion be, and they are denied.

(b) I think however, that Paragraph V of Defendant's Motion for Bill of Particulars, should be granted, but *only to the extent set forth in Paragraph V of the Government's Answer to Defendant's Motion.* But, if, after the Government has made the disclosures set forth in said Paragraph V of its Answer, the Defendant is still unable to properly prepare his defense, he may again be heard in this matter.

2. *Defendant's Motion, filed January 3, 1955, for Discovery and Inspection under Rule 16 of the Federal Rules of Criminal Procedure, as follows:*

> "Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the Government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just."

(a) Defendant moves for discovery and inspection of all "books, papers, documents, transcripts and tangible objects" relating to this case and in the "possession of Plaintiff", *which were obtained from the Defendant or belonged to the Defendant or were obtained from others by seizure or process.*

Paragraphs I, II and III of the Government's Answer are as follows:

"I.

The Government does not have in its possession any books, papers, documents, transcripts or tangible

objects relating to the within cause obtained from the defendant.

II.

The Government does not have in its possession any books, papers, documents, transcripts of tangible objects relating to the within cause belonging to the defendant.

III.

The Government does not have in its possession any transcripts relating to the within cause obtained from others by seizure or process."

Defendant's Motion is denied as to the matters set forth in Paragraphs I, II and III of the Government's Answer.

(b) The Government, in Paragraphs IV and V of its Answer, further replies to Defendant's Motion as follows:

"IV.

The Government does have in its possession certain books, papers, documents and tangible objects relating to the within cause, which were obtained from others by seizure or process.

V.

With reference to those items in Paragraph IV above, the Government stands ready to permit the Defendant and his attorneys, under proper supervision and at a time and place designated by the Court, to inspect, copy or photograph these books, papers, documents or tangible objects relating to the within cause provided that:

(a) Defendant specifies which particular books, papers, documents or tangible objects he wishes to inspect, copy or photograph; and

(b) Defendant establishes that the above items were obtained from others by seizure or process; and

(c) Defendant establishes that such items are material to the within cause; and

(d) Defendant establishes that such request then made is necessary to the proper preparation of the defendant's defense; and

(e) Defendant establishes that such request then made is reasonable."

If Subparagraphs (a), (b), (c), (d) and (e) of Paragraph V of the Answer of the Government be sustained, Rule 16 would be made noneffective. Defendant cannot specify what particular matter there is in the possession of the Government until he is awarded discovery and inspection. The Government in its above-quoted answer admits that such matter was seized from others and it would be idle to require Defendant to prove it. Presumably such matter is material to the within cause or the Government would not have seized it. Defendant cannot know what such matter is until he sees and inspects it, and cannot until then say whether it is necessary for the proper preparation of his defense, or whether his request is reasonable.

Discovery and inspection under Rule 16 should be and is granted without the conditions which the Government seeks to impose in Paragraphs IV and V of its Answer.

3. Defendant's Motion for Subpoena Duces Tecum for Honorable Malcolm Wilkey, United States Attorney, under Rule 17(c) of the Federal Rules of Criminal Procedure, reading as follows:

"(c) For Production of Documentary Evidence and Objects. A Subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify

the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."

In Bowman Dairy Co. vs. United States, 341 U. S. 219, a case similar to this, it is said that Rule 17(c) is chiefly to expedite preparation for the trial. It is also said:

> "Rule 16 deals with documents and other materials that are in the possession of the Government and provides how they may be made available to the defendant for his information. In the interest of orderly procedure in the handling of books, papers, documents and objects in the custody of the Government accumulated in the course of an investigation and subpoenaed for use before the grand jury and on the trial, it was provided by Rule 16 that the court could order such materials made available to the defendant for inspection and copying or photographing. In that way, the control and possession of the Government is not disturbed. Rule 16 provides the only way the defendant can reach such material so as to inform himself.
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> But if such materials or any part of them are not put in evidence by the Government, the defendant may subpoena them under Rule 17(c) and use them himself. It would be strange indeed if the defendant discovered some evidence by the use of Rule 16 which the Government was not going to introduce and yet could not require its production by Rule 17(c). There may be documents and other materials in the possession of the Government not subject to Rule 16. No good reason appears to us why they may not be reached by subpoena under Rule 17(c) as long as they are evidentiary. That is not to say that the materials thus

subpoenaed must actually be used in evidence. It is only required that a good-faith effort be made to obtain evidence. The court may control the use of Rule 17(c) to that end by its power to rule on motions to quash or modify.

It was not intended by Rule 16 to give a limited right of discovery, and then by Rule 17 to give a right of discovery in the broadest terms. Rule 17 provided for the usual subpoena ad testificandum and duces tecum, which may be issued by the clerk, with the provision that the court may direct the materials designated in the subpoena duces tecum to be produced at a specified time and place for inspection by the defendant. Rule 17(c) was not intended to provide an additional means of discovery. Its chief inovation was to expedite the trial by providing a time and place before trial for the inspection of the subpoenaed material. United States v. Maryland & Virginia Milk Producers Assn., 9 F.R.D. 509. However, the plain words of the Rule are not to be ignored. They must be given their ordinary meaning to carry out the purpose of establishing a more liberal policy for the production, inspection and use of materials at the trial."

In view of defendant's Motion for Bill of Particulars under Rule 7(b), and his Motion for Discovery under Rule 16, I think it would be premature to at this time grant Defendant's Motion for subpoena duces tecum. It may or may not be needed in the preparation for the trial. Defendant's Motion for Subpoena Duces Tecum should and will remain on the Motion Calendar to await the outcome of Defendant's Motions for Bill of Particulars and Discovery.

4. *Defendant's Motion to Change the Venue in this case from the Corpus Christi Division to the Laredo Division of the Court under Rule 21(a) of the Rules of Criminal Procedure, reading as follows* (italics mine):

"(a) For Prejudice in the District or Division. The court *upon motion of the defendant* shall transfer the proceeding as to him to *another district or division* if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division."

(a) The Government opposes the Defendant's Motion. The pleadings, briefs, affidavits, exhibits, etc., filed and brought forth by both parties constitute a large record which I have examined and considered.

The cases which the Government cites,[1] many of which Defendant also cites, have been examined. They are helpful. They hold generally that a defendant in a criminal case has the burden of proof and must make a proper showing under the statute or rules, in order to obtain a change of venue to another district or division. Each case cited shows the facts in that case and points out why such facts do or do not authorize or require such a change. In most of them a change of venue is denied. They also discuss newspaper publicity, etc., as a ground for a change of venue. In all of them it is held that a change of venue is in the sound discretion of the court

[1] Shockley v. United States, 166 F.(2d) 704 (C.A. 1949), certiorari denied 334 U.S. 830; Dennis v. United States, 171 F.(2d) 986, certiorari granted 337 U.S. 954; United States v. Mellor, (D.C. Neb., 1946) 71 F. Supp. 53, affirmed 160 F.(2d) 757, certiorari denied 331 U.S. 848; Kott v. United States, (5 C.A. 1949) 163 F.(2d) 984; United States v. Florio, 13 F.R.D. 296 (S.D. N.Y. 1952); United States v. Lattimore, 112 F. Supp. 507 (S.D. D.C. 1953); Kerston v. United States, 161 F.(2d) 337 (10 C.A. 1947), certiorari denied 331 U.S. 851; United States v. Carper et al., (D.C. D.C. 1953) 13 F.R.D. 483; United States v. Moran, (2 C.A. 1952) 199 F.(2d) 107; Shushan v. United States, (5 C.A. 1941) 117 F.(2d) 116; Allen v. United States, (7 C.A. 1924) 4 F.(2d) 688; United States v. Mesarosh, (D.C. W.D. Penn. 1952) 13 F.R.D. 180.

and must be determined on the facts of each particular case.

(b) Originally Defendant's Motion was submitted on many affidavits and many newspaper clippings from certain Corpus Christi newspapers filed and offered by Defendant, and a few affidavits filed and offered by the Government. Later the Government asked and was granted permission to and has also filed and offered many affidavits. All these I have carefully studied. They, along with other portions of the record, show the geographic location, population, etc., of the Corpus Christi and Laredo Divisions of the Court and of the county and town in which Defendant resides. They also show the extent of circulation and places of circulation of the newspapers mentioned.

Many different opinions, viewpoints and ideas are reflected by such affidavits. Apparently many of the persons making them are not at all familiar with, or overlooked the fact, that the Court must follow the method fixed and required by law in selecting, summoning, and empaneling a jury in this case. Some of them apparently were so uninformed about the law and court procedure that they erroneously regarded the Motion by Defendant for a change of venue as a reflection on the people of the Corpus Christi Division, etc. Some took sides for or against the Defendant. A preponderance of the evidence reflected by such affidavits—and I have no doubt on the subject and find—that there exists in the Corpus Christi Division of the Court so great a prejudice against Defendant that he cannot obtain a fair and impartial trial in this case in such division.

Regardless of their opinions, views, or ideas, substantially all of the persons who made such affidavits mention or refer to the publication of many articles about Defendant in two newspapers published at Corpus Christi with large circulations in the Corpus Christi Division. Defend-

ant has brought and offered in evidence clippings, etc., of a very large number of these articles or publications, extending over a period of several years and on down, which I have studied. I do not undertake to go into details about them, they speak for themselves. They are simply in evidence here and it is not within the province of the Court to either condemn or justify them. It is sufficient to say that the Defendant has therein been given, during recent years, much publicity, generally very unfavorable and sometimes most unfavorable. Such publications, generally with prominent headlines, are directly or indirectly with respect to Defendant or persons closely associated or said to be associated with him, and concern political matters, elections, law enforcement, taxation, etc., generally and in the town of San Diego, and in Duval County, where Defendant resides, and in some adjoining counties. They are also with respect to the killing at night of a young man at Alice, Texas, in connection with which Defendant and persons associated, or claimed to be associated, with Defendant are mentioned. Also with respect to the stationing of Texas Rangers in Duval County, the investigation by the Attorney General of Texas and others of Defendant and associates, and the affairs of Duval County and the enforcement of law in such county. Also with respect to the impeachment of certain judicial and other officers thereof. Also with respect to many lawsuits filed on behalf of the state of Texas and the United States and others against Defendant and/or those associated with him. Reference is made to the clippings for full particulars. These publications whether standing alone or when considered in connection with such affidavits, support, strengthen and confirm my view that there is so great a prejudice against Defendant in the Corpus Christi Division that he cannot obtain a fair and impartial trial there in this case.

(c) This brings us to the question of where this case should be sent for trial. I discuss the suggestions shown in the record.

I think it is clear that Rule 21(a) hereinbefore quoted must be construed in the light of the Sixth Amendment to our Federal Constitution, as follows (italics mine):

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the *State and district wherein the crime shall have been committed*, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence."

The construction placed upon this Amendment has uniformly been that unless a defendant in a criminal case *waives his right* to be tried in the district in which the crime was committed, the case cannot be lawfully sent to another district for trial.

The offenses with which Defendant is charged are alleged in the indictment to have been committed in this district and this case must be tried in this district *unless the Defendant has waived his right in that respect.* An examination of the Record and particularly Defendant's Motion, show definitely that he has not done so. The holding here then must be, and is, that this Court is without power to transfer this case to any other district.

I think it is clear that Rule 21(a) hereinbefore quoted, and Rules 18 and 19 of the Federal Rules of Criminal Procedure, must be construed together. Rules 18 and 19 are as follows (italics mine):

> "Rule 18. District and Division.
>
> Except as otherwise permitted by statute or by these rules, the prosecution *shall be had* in a district in which the offense was committed, but if the district consists of two or more divisions the trial shall be had in a division in which the offense was committed.

"Rule 19. Transfer within the District.

In a district consisting of two or more divisions the arraignment may be had, a plea entered, the trial conducted or sentence imposed, *if the defendant consents*, in any division and at any time."

Defendant is charged in the indictment with having committed such offenses in the Corpus Christi Division of the Court, and under Rules 18 and 19 must be tried there unless he has, as provided in Rule 19, *consented* to a trial in some other division.

An examination of the Record and Defendant's Motion shows definitely that in filing and presenting his Motion under Rule 21(a) he has consented, as is his right, to a trial *only* in the Laredo Division. In fact, Defendant says in his brief, "We wish to be clearly understood that if the case is not to be transferred to Laredo we prefer that it remain in Corpus Christi."

It is, therefore, under the law not within the power of the Court to transfer the case to either the Houston, Galveston, Victoria or Brownsville Division, but only to the Laredo Division.

Because of this view of the law I do not deem it necessary to decide, and because the information in the Record as to conditions in the Houston, Galveston, Victoria and Brownsville Divisions is very meager, I do not deem it proper to decide the questions raised as to those divisions.

(d) The Government raises another question.

As I understand the Government's presentation of these matters it did not, when the case was first submitted, claim that it could not obtain a fair and impartial trial at the Laredo Division, nor does it do so now. It says in its Brief filed (italics mine):

"That the Government would be under a *serious handicap* in prosecuting this defendant in the Laredo Division."

I have already discussed the lack of power in the Court to do so. I have also pointed out the state of the record with respect to conditions in the Houston, Galveston, Victoria and Brownsville Divisions.

But I have studied the brief and affidavits of both the Government and Defendant with respect to conditions in the Laredo Division. The Government's affidavits show that certain conditions are believed to exist. Defendant's affidavits show that it is believed that they do not exist. No overt acts are alleged or shown. Apparently there exists a political controversy of long standing at Laredo, and many, or some of those making the affidavits for the Government, and many or some of those making them for the Defendant are in different political camps or hold radically different political views. The two groups, or some of them, seem to now see each other "through a glass darkly". It might be said facetiously that they seem to suffer under "more heat than light". Basing my findings, as I must, wholly on all the affidavits I do not think that the evidence shows that the Government either will or might "be under a severe handicap" in the prosecution of this case as claimed. I find to the contrary.

(c) My conclusion is that the Motion of the Defendant as made should be granted and the venue of the case should be changed from the Corpus Christi Division to the Laredo Division.

Let appropriate orders be drawn and presented in accordance with Paragraphs 1, 2, 3 and 4 hereof.

T. M. KENNERLY
United States District Judge

Concur:

/s/ JAMES ALLRED,
Judge.

Oral Opinion

THE COURT: I think I can dispose of the matter without hearing further from the Government.

As a retired Judge, I receive my work in this district from my brethren, the other Judges, and I received a request from Judge Allred to hear these four motions that are disposed of by the opinion filed.

In the motion for change of venue, I found an enormous record. I think there were more than one hundred affidavits, and certainly more than a hundred finally, because there were some filed after the record came to me. There were very satisfactory briefs, and there were several hundred—I didn't count them, and there may have been five or six hundred—clippings from two daily papers in Corpus Christi.

All of these I considered as carefully as I knew how to consider them, and I found myself settled on one opinion about whether the case should be tried in the Corpus Christi Division. I am doubtful that any Judge in this district, or any other district, reviewing the record as I did, would have reached any other conclusion, and that is that I reached the conclusion that the case should not be tried in Corpus Christi, and that defendant's motion for change of venue should be granted.

In reaching that conclusion, or rather in examining the record, I reached this further conclusion, that I gravely doubted whether in the administration of justice gen-

erally, the case should be tried in this district at all. I reached that conclusion, not as favoring either the Government or the defendant, but more from the standpoint of a judge who is charged with the administration of justice in the district.

But when I came to examine the law, I found that I was without power to transfer the case outside of the Southern District of Texas. As you all know, we have in the state courts of Texas a practice by which the judge sometimes of his own motion sends a case here, there and elsewhere. There is no such provision in the federal statutes, and I found, as I understand the law, that I had no authority to transfer the case out of the Southern District of Texas. If I had had that authority I would have sent it to Amarillo, or Sherman, or Texarkana, or some of those places as far removed from the scene of the troubles as I could, or as I could find. I would have done that not, as I say, to favor either the defendant or the Government, because I feel that justice in the case would be best administered by transferring the case to one of those places.

But as stated, I could not do that as I understand the law.

I then discovered that I could not transfer the case to any other division of the district except Laredo. You gentlemen who were in the case will understand or are familiar with the reasons that I gave in the opinion, which is concurred in by Judge Allred, and I think we are correct in that, that is on the law, that it was not legal, not within the power of the Court, to transfer the case to any place except to Laredo, so the case was transferred there.

Now we come to this motion by the Government to dismiss the case because of the fact that a new indictment covering the same matter has been presented in the Western District, and the Austin Division of the Western District, and I am asked by the Government to dismiss this case in this district. Under the rule—what is it, 46?

Mr. Looney: 48-A, Your Honor.

The Court: 48-A, evidently there is some discretion in the Court as to the matter of whether the case should or should not be dismissed.

In twenty-four years on the bench in this district, I do not recall ever having at any time hesitated to dismiss a case when requested by the Government. That was of course under the old law, and under the present rules. If I have a discretion under the rules now as to whether this case should or should not be dismissed, I must exercise that discretion and allow it to be dismissed, because I do not think that the defendant, either in the hearing this morning or in this enormous record on the question of change of venue, has shown any reasons why the case should not be dismissed.

In doing that I am assuming as you want me to assume, that the Court in Austin has jurisdiction of the case. On that point, of course, I do not decide it does or does not, whether it has jurisdiction or does not have jurisdiction. I am going to dismiss this case as requested by the Government.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15612

GEORGE B. PARR, *Appellant*,

versus

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Southern District of Texas.

(July 22, 1955.)

On Motion of Appellee to Dismiss the Appeal and on Motion for Leave to File Petition for Writs of Mandamus and Prohibition.

Before HUTCHESON, Chief Judge, CAMERON, Circuit Judge, and DAWKINS, District Judge.

HUTCHESON, Chief Judge: This appeal is from an order dismissing, on motion of the United States, an indictment in three counts returned against the defendant below, appellant here, in the Corpus Christi Division of the Southern District of Texas, and charging him within such division and district with preparing and causing to be prepared false and fraudulent income tax returns for the years 1950, 1951, and 1952, and filing them with the Collector of Internal Revenue for the First Internal Revenue Collection District of Texas, by depositing and causing them to be deposited at the Corpus Christi Division Office.

Giving notice of appeal from the order, defendant is here attacking it as erroneous and seeking its reversal.

The United States, proceeding under Rule 39(a), Federal Rules of Criminal Procedure, 18 U.S.C.A., "Supervision of Appeal in Appellate Court",[1] has filed a motion to dismiss the appeal on three grounds,[2] and the matter is before us on the motion to dismiss.

Supporting its motion by brief and argument and the citation of many authorities,[3] the United States urges upon us that the only kind of order having the requisite finality to support an appeal in a criminal case is one imposing a sentence and leaving nothing to be done but to enforce by execution what has been determined, and that the order in question determined nothing as to defendant's guilt or innocence. So urging, it insists: that whatever may be the merits of appellant's contentions as to the correctness or incorrectness of the judge's action in entering the order, those contentions are not, they cannot be, for decision here; and that, since the dismissal of the indictment determined nothing except that it would be no longer prosecuted, the determination by us of defendant's contentions must await the entry of, and the appeal from, a final judgment.

On his part, the appellant, realizing that an ordinary dismissal on the motion of the United States of a pending

[1] Cf. Semel v. United States, 158 F(2) 229.

[2] These are: (1) that the order of dismissal is not appealable because not a final decision in a criminal case within the meaning of 28 U.S.C., Sec. 1291; (2) because, as the record shows, the defendant has been indicted in the Western District of Texas, and it is the intention of the government to prosecute that indictment to a final decision there; and (3) because the appeal is frivolous and obviously without merit; and is taken for the purpose of delay.

[3] Particularly Berman v. U.S., 302 U.S. 211; Cobbledick v. U.S., 309 U.S. 323; U.S. v. Swidler, 207 F(2) 47; Lewis v. U.S., 216 U.S. 611; Heike v. U.S., 217 U.S. 423; McLish v. Roff, 141 U.S. 661; Ex parte Altman, 34 Fed. Supp. 106; and U.S. vs. John Doe, 101 Fed. Supp. 609.

indictment is not a final judgment from which an appeal will lie, is here insisting that the order appealed from is not such an order, and this appeal is not such an appeal. So insisting, he thus states his case:

> "It is the position of the accused that (1) the dismissal was filed during the trial without his consent, contrary to the provisions of Rule 48(a) Rules of Criminal Procedure, and (2) the order transferring the case from the Corpus Christi Division to the Laredo Division, Southern District of Texas, pursuant to Rule 21(a) R.C.P., was res judicata of venue and effectively lodged exclusive jurisdiction of the offenses charged by the indictment against accused in the Laredo Division, Southern District of Texas. For these and other reasons stated below, the accused urges that the judgment of dismissal filed May 20, 1955, from which this appeal is prosecuted is an erroneous final decision of the District Court of the United States for the Southern District of Texas, Laredo Division, within the meaning of 28 U.S.C., Section 1291."

In support of his position, as thus stated, appellant cites no federal decision; there is none, holding that an order dismissing an indictment is appealable, none supporting his claim that under federal jurisprudence the order in this case was a final and appealable order. Instead he cites cases dealing with non suits entered in civil cases such as *Cybur Lumber Co.* v. *Eckhart* (5 Cir.) 247 Fed. 284; *Mass. F. & M. Ins. Co.* v. *Schmick*, 58 Fed. (2) 130; Cf. *Marks* v. *Feist, Inc.*, 8 Fed. (2) 460; *Ruff* v. *Gay*, 67 F(2) 684; *Weeks* v. *F. & C. Co.*; 218 F(2) 503; and *Vaughan* v. *City Bank & Trust Co.*, 218 F(2) 802.

He further urges that the order, entered on defendant's motion, transferring the case from the Corpus Christi to the Laredo Division for trial was res judicata as to the jurisdiction and venue of the prosecution of the defendant

for the identical offense charged in the indictment in this case; that the court, therefore, was without authority to dismiss the case under Rule 48(a) Federal Rules of Criminal Procedure, 18 U.S.C.; that under the circumstances the only order of dismissal authorized is with prejudice forever terminating the prosecution of defendant for the offense charged; and that thus the order sought to be appealed from is invested with finality. He, however, cites no federal cases in support of this view. Instead he relies entirely upon decisions of state courts controlled by particular statutes or particular principles or theories of jurisprudence. Basic among them is the case of *Coleman* v. *State*, 35 So. 937; a Mississippi decision holding that *under a statute providing in effect that where an offense is committed in one or more counties that county where the offense was commenced, prosecuted or consummated, where prosecution shall be first begun*, shall have exclusive jurisdiction of the cause, the state could not, after having begun the prosecution in one county, dismiss the indictment and file it in another county. He also cites several civil cases from Texas, one of them holding that under certain conditions interlocutory orders, though not appealable for want of finality, may be complained of on an appeal from a final judgment in the cause, *Coke* v. *Pottorff*, 140 SW(2) 586, and others that, under Texas Rules of Civil Procedure expressly so providing, appeals will lie from certain interlocutory orders.

As his final position, appellant, disputing appellee's claim that the appeal is frivolous, asserts that his claim of prejudice from the dismissal order is meritorious in that if the orders transferring the cause to the Laredo Division and then dismissing the indictment, did not constitute former jeopardy so as to prevent further prosecution, the order of transfer was a holding that he could be prosecuted only in that division and in legal effect prevents his being prosecuted in the Western District of Texas, or anywhere except in the Laredo Division of the Southern District.

Interpreting these contentions and arguments in terms of legal theory, they seem to be: that when, after lengthy hearings, Judge Kennerly granted defendant's motion to transfer the case to Laredo, his ruling was a final and irrevocable adjudication that jurisdiction of the offense of defrauding the revenue was thereby exclusively vested in the Laredo Division of the Southern District of Texas; that it created in the defendant a vested right to be tried there, and there alone; and that, when the government presented the facts to a grand jury and obtained an indictment in the Western District of Texas, and then, as appellant claims, erroneously procured a dismissal of the indictment earlier obtained in the Southern District, it in effect induced the court to enter an order depriving defendant of that right, and thus the order appealed from was invested with finality and was and became a final judgment. Thus, as it seems to us, presenting his position at once on the motion to dismiss and on the merits of the appeal and analogizing the dismissal of the indictment over his objection to a non suit in a civil case over the objection and to the prejudice of the defendant, the defendant argues quite contradictorily: (1) that this deprivation furnishes the element which at once invests the order with finality sufficient to make it appealable and requires its reversal; and (2) that if it stands unreversed, it has the effect of entitling him to an acquittal altogether.

We pass, without consideration or discussion of them, appellant's views on the merits, because, unless the order is final and we think it is not, the merits are not before us, to take up and dispose of the only matter now before us, the finality *vel non* of the order here sought to be appealed from.

We think it clear that none of defendant's claims that it is final are well taken, as bearing upon the finality of the order for the purpose of appeal. All that occurred in this case and the sole purport and effect of the order sought to be appealed from is simply that the United

States has elected to discontinue, and has discontinued, the prosecution of the indictment returned in the Southern District of Texas, and that the order sought to be appealed from is therefore not final but discretionary and interlocutory and not appealable. *Semel v. United States*, 158 F(2) 233, and authorities cited in note 3, *supra*. These, though not on all fours on their facts, do give insight into the problem of "finality" presented here. They, together with Swift, 339 U.S. 684 and Cohen, 337 U.S. 541, indicate the general and consistent approach that an order is "final" only if it terminates the matter in controversy below. When a seemingly interlocutory order has been held appealable, it has been on the theory that irreparable injury will result from dismissal of the appeal or that the particular narrow issue with which the order was concerned is wholly separable from the remainder of the case and the order terminates the separable issue.

The matter put in controversy by the dismissed indictment was the defendant's guilt of the crime of tax evasion charged in it. That issue was never reached for determination, let alone determined, and under the controlling authorities cited, *supra*, the appeal must, therefore, be, and it is hereby DISMISSED for want of finality in the order appealed from.

From these views that the order appealed from was not a final order and the court is without jurisdiction of this appeal to be followed by an order dismissing it, completely inconsistent as they are with the theory of protecting and preserving this court's jurisdiction, on which appellant's motion was filed in this cause, it follows that the motion for leave to file petition for writs of mandamus and prohibition must be, and it is, DENIED.

CAMERON, Circuit Judge, I dissent.

CAMERON, Circuit Judge, dissenting:

I.

In its opinion granting motion of appellant Parr to change the venue of the first indictment from the Corpus Christi Division, where it was brought, to the Laredo Division of the Southern District of Texas, the District Court said in part:

> " * * * substantially all of the persons who made such affidavits mention or refer to the publication of many articles about defendant in two newspapers published at Corpus Christi with large circulations in the Corpus Christi Division. Defendant has brought and offered in evidence clippings, etc., of a very large number of these articles or publications, extending over a period of several years and on down, which I have studied. * * * [Later the Court estimated the number as between five and six hundred.] It is sufficient to say that the defendant has therein been given, during recent years, much publicity, unfavorable and sometimes most unfavorable. Such publications, generally with prominent headlines, are directly or indirectly with respect to defendant * * * and concern political matters, elections, law enforcement, taxation, etc., generally and in the town of San Diego and in Duval County, where defendant resides, and in some adjoining counties. They are also with respect to the killing at night of a young man at Alice, Texas, in connection with which defendant and persons associated * * * are mentioned. Also with respect to the stationing of Texas Rangers in Duval County, the investigation by the Attorney General of Texas * * *. Also with respect to the impeachment of certain judicial and other officers thereof. Also with respect to many lawsuits filed on behalf of the State of Texas and the United States against defendant * * *.

> "These publications whether standing alone or when considered in connection with such affidavits, support, strengthen and confirm my view that there is so great a prejudice against defendant in the Corpus Christi Division that he cannot obtain a fair and impartial trial there in this case."

It was in a jurisdiction pervaded by that atmosphere that the Government initiated this prosecution. In so doing, the Government's attorney asserted that a precedent, observed for twenty years, of bringing such prosecutions at Austin, was broken. Having the right to prosecute at several other points, it chose as the battleground upon which appellant's[1] liberty would be decided a community in which the Government would have had all of the advantage and the appellant would have had a hard uphill fight.

When the motion for change of venue was made the Government opposed the change and offered many affidavits in opposition to it. After an extended hearing in which the parties filed elaborate written briefs, the District Judge granted a change of venue based upon the conditions found by it to exist where the prosecution was brought.

In commenting upon the transfer to the Laredo Division the District Court mentioned that the Government "did not, when the case was first submitted, claim that it could not obtain a fair and impartial trial at the Laredo Division, nor does it do so now. It says in its brief * * *, 'that the Government would be under a severe handicap in prosecuting this defendant in the Laredo Division'." The District Court then proceeded to describe certain political controversies as existing in the Laredo Division, appellant

[1] The matter is before us on appeal from order dismissing the first indictment and also on Petition for Mandamus and Prohibition and Motion to file same. Parr will be referred to in every instance only as appellant.

being in one political camp and some of the prosecuting witnesses being in the other. Having considered the showing fully, the District Court concluded: "I do not think that the evidence shows that the Government either will or might be under a severe handicap in the prosecution of this case as claimed. I find to the contrary". The carefully drawn opinion was written by retired District Judge Kennerly and concurred in by active Judge Allred.

That opinion was filed April 28, 1955 and five days later, May 3rd, the United States Attorney called the District Judge over long distance telephone advising that the Government desired to disiniss the first indictment because a new indictment had been returned in the Western District of Texas. He stated to the judge that he did not believe that the defendant could be heard on the matter under Rule 48. The regular District Judge ruled otherwise, however, and set the motion to dismiss for hearing before Judge Kennerly.

The motion to dismiss the first indictment was filed May 4, 1955 and with it was filed a copy of the new indictment returned in the Western District involving the same facts. With it also was filed a written statement of reasons for the dismissal. The chief reason given was that the Government had chosen to present the new indictment in the Western District and that it had a right so to do, adding that new factors had been introduced in the situation: "Among the recent factors weighing in the overall appraisal of where prosecution should be had should be mentioned the recent decision of the court to transfer venue from Corpus Christi to Laredo in the Southern District of Texas. This means that trial will be had in a division in which neither the taxpayer lives nor the Government chose originally to bring prosecution, and thus establishes a set of circumstances which was never in the contemplation of Government counsel at the time the original prosecution was brought in the Southern District of Texas."

The District Court for the Southern District conducted an extensive hearing on the Government's motion to dismiss the first indictment in which it heard an extended statement by the Government counsel and a like statement by one of appellant's counsel, and the Government counsel was subjected to a short examination by appellant's counsel.

From the statement of Government counsel and the testimony given by him, the chief articulated reason for the motion to dismiss the Corpus Christi indictment was that the Government did not feel that the witnesses for the Government would stand up as well in the Laredo Division as they would elsewhere. In his testimony, the attorney adverted to the fact that it was easier to make proof of venue in the Austin Division (Western District), but his answers, on the whole, failed to sustain that contention. Here is an answer given by the attorney which may be taken as epitomizing the underlying reason for the Government's opposition to trying the case in the Laredo Division:

> "* * * the very fact that the case in the Southern District has now been transferred to Laredo and the fact that testimony will have to be elicited from witnesses who are either reluctant or hostile makes—throws a different light on the Government's proof of venue, as it does on the Government's proof of other aspects of the case. I point out to you in that regard that Mr. Benson here, who was in the employ of Mr. Parr and signed the tax returns, was an employee of Mr. Parr and he has lived down in that area. Not going further into the case, but the change in the location affects the proof as to venue as it does the other facts of the Government's case. * * *
>
> "As far as the basic facts are, we believe them to [be] the same; as far as the practical problem of proof in a lawsuit, the scene has been altered, the

situation has been altered considerably by the shifting of the case from Corpus Christi to Laredo."

At another point in his testimony Government counsel thus summarized the attitude that the Government had the plain right to shift the scene of the trial and was merely exerting that right:

> "I think it has been very clear from several documents we have filed that we would have preferred the case to remain in Corpus Christi, and it is certainly clear with the action of the Attorney General and myself that the Attorney General prefers that the case go to Austin, and believes, in the exercise of his office as the chief prosecutor, it ought to be prosecuted there in Austin."

The Judge for the Southern District made it clear in his brief opinion what influenced him to grant the motion to dismiss:

> "Now we come to this motion by the Government to dismiss the case because of the fact that a new indictment covering the same matter has been presented in the Western District * * * Evidently there is some discretion in the court as to the matter of whether the case should or should not be dismissed.
>
> "In twenty-four years on the bench in this district, I do not recall ever having at any time hesitated to dismiss a case when requested by the Government. That was, of course, under the old law, and under the present rules. If I have a discretion under the rules now as to whether this case should or should not be dismissed, I must exercise that discretion and allow it to be dismissed, because I do not think that the defendant, either in the hearing this morning or in this enormous record on the question of change of

[2] It is evident that the transcript omits the word not at this point.

venue, has shown any reason why the case should not be dismissed * * * I am going to dismiss this case as requested by the Government."

Appellant prosecuted an appeal from the judgment entered dismissing the former indictment, and briefs have been filed and that case stands on our docket for decision in due course.

Thereafter, on May 31, 1955 the Government called up criminal case 3866 in the Austin Division of the Western District of Texas, the new indictment, and appellant filed a motion to stay proceedings therein until the appeal could be disposed of. That motion was overruled and appellant filed a motion to transfer the second indictment to the Laredo Division of the Southern District for trial, which was likewise overruled. The District Court for the Western District of Texas thereupon set the new indictment for trial July 18, 1955. Immediately thereafter appellant filed in this Court a Petition for Mandamus and Prohibition together with motion for leave to file the same, and the Government has filed its opposition thereto along with a motion to dismiss the appeal.

II.

I think leave should be granted that the Petition for Mandamus and Prohibition be filed and that an order should be entered at least holding these complex proceedings in *status quo* until the appeal may be heard in due course, and the proceedings can be carried on in an orderly fashion preserving the rights of the appellant and the Government alike. The majority holds that the appellant is entitled to no relief at all, based chiefly upon the ground that it is conceived that appeal does not lie from the order dismissing the first indictment. I think that the appealability of that order presents a serious question. Under the recent decisions of the Supreme Court in *Swift, etc. Co. v. Compania, etc.*, 339 U.S. 684, and *Cohen v. Beneficial, etc. Co.*, 337 U.S. 541, and our decision

in *Tomlinson v. Pulver*, 220 F. 2d 308, there is a probability that appeal does lie from this order. But I see no reason to decide this question now. The Government has offered no explanation at all for its great haste in bringing its indictment returned in May to trial at once. The events forming the basis of the prosecution occurred between four and six years ago. There is no reason why the appeal should not be heard in due course by this court, having the benefit of oral argument of counsel and leisurely study of the briefs.

III.

But we have ample power to deal fully with this situation even if that order is not appealable and there is precise precedent for such a course. In *Atlantic Coast Line R.R. Co. v. Davis*,[3] we sustained Mandamus and Prohibition as proper means for arresting proceedings in order that justice might be done with respect to a non-appealable order. We gave as a reason (185 F.2d 768) for allowing the extraordinary writ that the situation was of such a nature as "renders the likelihood of any fair and effective correction of the action of the Court by subsequent appeal * * * highly improbable, if not impossible". [Citing cases.] The same is true here as regards the probablity of correcting, after possible conviction on the second indictment, any error which may have been made in permitting dismissal of the first indictment. And we noted further that the allowance of the writ was in "aid and maintenance and protection of this Court's appellate jurisdiction." A District Court in Florida had entered an order under 28 U.S.C.A. 1404(a) transferring a civil action to another district for trial. Appeal did not lie from that

[3] 5 Cir. 1950, 185 F.2d 766. Petition for leave to file mandamus, etc. denied by Sup. Ct. 340 U.S. 941, and the cases cited; and see 28 U.S.C.A. 1651(a) and the additional cases collected in the article cited in Note 6 *infra*.

order.[1] Nevertheless we allowed Petition for Mandamus and Prohibition to be filed and ordered the District Court to vacate the transfer order and to proceed with the trial of the case. If the facts justify it, we can grant full and appropriate relief here.

I think the facts do justify it. I would not state my reasons for dissent if I did not feel that this record presents an important question of procedure whose protection appellant is entitled to invoke and whose definition the bench and bar are entitled to have. It is the duty of the courts to hold the scales of justice in equal balance between the Government and a citizen charged with crime in exactly the same manner as those scales are held in litigation between two private individuals.

An instinctive feeling of doubt arises whether these proceedings would be attended with the same results if they were between two private litigants. Suppose private litigant A had sued private litigant B in a civil action and had chosen to lay the venue in the Corpus Christi Division. B came along and filed a motion to transfer to the Laredo Division under 28 U.S.C.A. 1404(a). After an extended hearing and over the opposition of A, an order was entered transferring the case to the Laredo Division.[2] Without waiting for a week to pass, litigant A sought out another forum and there served the same complaint on litigant B proceeding back to the original jurisdiction with the request that the original civil action be dismissed solely on the ground that A did not feel that his witnesses would stand up as well in the jurisdiction to which the transfer had been made. It is not hard to visualize the effectiveness with which counsel could declaim that the

[1] Crummer et al v. duPont, et al, 5 Cir. 1952, 196 F2d 468.

[2] Of course, the case here is stronger for appellant. The transfer here was from a point where prejudice palpably existed in favor of one litigant to a point where prejudice did not exist for or against either litigant.

processes of the courts were being trifled with to harass litigant 'B.

With respect to civil litigation, it has been said that, prior to the passage of 28 U.S.C.A. 1404(a), venue was the "prime prerogative of plaintiffs".[6] It was pointed out that this Act of Congress had transferred some of that prerogative to the defendant and a large portion of that prerogative to the court, to be used by the court in deciding questions of venue on the basis of fairness to both parties. It was further pointed out that the courts have almost universally exercised that prerogative to see to it that the rights of both the parties are protected without advantage to either.

Does not Rule 48(a) have a similar effect with respect to criminal prosecutions? Are we to assume, as the court below manifestly assumed, that venue is still the prime prerogative of prosecutors to be used in a situation like this one to gain an advantage for the Government or to escape from a position of less advantage in which the Government found itself as the result of its own election?

I do not think so. Prior to the adoption of the new rule, the Government had had a free hand and had used it freely. The court below stated in its opinion that in more than twenty years it had never refused the Government in its request for dismissal and it is reasonably clear that this unbroken practice was decisive in its mind.[7]

---

[6] "*Forum Non Conveniens* and 28 U.S.C.A. 1404(a)", 23 Miss. Law Journal p. 1 (December, 1951).

[7] Besides indicating its feeling that the Government still had, under Rule 48, practically an absolute right to dismiss, the Court indicated further that, in the hearing of such a motion the defendant had the burden of proving that the indictment should not be dismissed. Both assumptions represent misconceptions of the law. The Government, seeking affirmative action by the Court carried the burden of showing that there was some valid legal reason for the dismissal.

If that is still the law, the innovation in the Rules of Criminal Procedure requiring an order of court before an indictment could be dismissed would be meaningless and without purpose.[7] The manifest basis for the change in procedure was that the Supreme Court, with Congressional approval, was doing with respect to criminal prosecutions, what Congress had done with respect to civil actions: it was taking the choice of venue out of the unfettered hands of the litigants and giving it to the courts to be exercised in a way which would insure justice and equal treatment to all parties.[8]

If that was the purpose and if that is the meaning of the rule, then there is grave doubt whether that purpose

[7] The Notes of the Advisory Committee, 18 U.S.C.A. pp. 537 s contain this comment:

> "The first sentence of this rule will change existing law. The common law rule that the public prosecutor may enter a nolle prosequi in his discretion, without any action by the court, prevails in the Federal Courts. * * * This provision will permit the filing of a nolle prosequi only by leave of court. This is similar to the rule now prevailing in many states. * * *."

The Advisory Committee had recommended that the right to dismiss be left with Government attorneys with the requirement that written reasons be given. But the Supreme Court rejected that recommendation and inserted the requirement for court approval.

Even before the passage of this rule, one District Court had held that the Court had the power, in the exercise of a judicial discretion, to refuse a requested dismissal, U.S. v. Krakowitz, D.C. Ohio, 1943, 52 F. Supp. 774.

[8] Few cases are cited by counsel and they are not of much help. Two federal cases are brought to our attention, United States v. Haupt, C.A. D.C., 152 F.2d 771, and United States v. Jones, 7 Alaska 378, and both speak in condemnatory terms of the practice of multiple indictments. The practice of dismissing an indictment in order to proceed under a new one in a more favorable climate is condemned in several state court cases, notably Ex Parte Lancaster, Ala. 1921, 89 So. 2d 721, State v. Milano, La. 1916, 71 So. 131, and Coleman v. State, Miss. 1904, 35 So. 937.

and that meaning have been vindicated here. There is no way the Government can escape the conclusion that its actions here were taken in an effort to select a forum in a locale where the atmosphere would be favorable to the Government and not to the defendant."[10] No criticism is directed to such a course. Litigants from time immemorial have jockeyed for positions of advantage and have shopped about in an effort to light upon the most favorable venue situation for their own success. But courts have to be blind to such machinations. They must weigh the facts of the case before them and give judgment based upon the rights of the parties contending as equals and upon a battleground which favors neither.

[10] The Government's attorney had said this, in stating to the District Court the reasons the Government desired the order of dismissal: "These witnesses, in most instances, are reluctant, and in some instances are hostile. We feel that the trial of the case in Laredo, close to the defendant's seat of political power and his associations there, would have an adverse effect on eliciting the truth from the witnesses the Government will be forced to bring in order to establish this case. * * *"

The Atlas shows that Laredo is in Webb County and San Diego is in the adjoining County of Duval, and that the two cities are rather close together. It further shows that Austin is more than one hundred miles away from San Diego. Students of the problem of law enforcement largely agree that government functions at its best at the local level, and that prosecutions are likely to bring more just results when they are conducted where the defendant and the witnesses are known and where the difficult question of law enforcement has its most direct impact. The vast majority of criminal prosecutions are conducted in such an atmosphere. Jurors who have no acquaintance with the defendant or the witnesses and who do not have a knowledge of all of the facts and circumstances surrounding the problem of the enforcement of the law—such as would inevitably be the case in a district so far removed from the site of the happenings forming the basis of the prosecution—are at a great disadvantage.

In passing on the Government's contentions that it would be under a disadvantage in a trial at Laredo, which it had presented fully on the motion for change of venue, the District Court had ruled directly that the Government would not be under a disadvantage there.

The Government made its selection of the battleground in the first instance as it had a right to do. The court found that battleground to be too favorable to the Government and unfair to the defendant. The court changed the battleground to one if adjudicated to be favorable to neither side.[11] To permit the Government, under those circumstances, to repudiate the whole proceeding it had initiated and to move the scene of the fight to another place of its own selection is to open the door to the possibility of grave abuses. Further, such a course would deny appellant rights which he is entitled to have the courts protect.

If it be thought that the views here expressed give hospitality to the concept that the Government does not belong in a favored-litigant class, they are so intended. The mass of litigation, both civil and criminal, to which the Government is party is sufficient to cause the courts increasingly to give most careful scrutiny to the status of the Government as a litigant. In the very nature of things, the Government enters every contest with a citizen with a distinct advantage.[12] Moreover, all who

[11] It is true that the battleground was the choice of the defendant, but the Court found that the rights of the Government would no be prejudiced in the Laredo Division.

[12] This thesis was well developed by a paper read May 30, 1952 to the Judicial Conference for the Fifth Circuit, and a part of the records of that Conference, by Hon. Robert B. Troutman of Atlanta, Georgia. Here is an excerpt from that paper:

> "With this vast power, and these tremendous resources, the United States is, indeed a formidable adversary * * * The ordinary citizen stands in awe when confronted with such litigation. * * * It is a Goliath, a giant in power, whose challenge a modern Saul and all his Captains might with good reason hesitate to accept. More often than not, however, the citizen has no choice. The initiative is on the side of the Government.
>
> "The odds apparently are uneven. * * * He is assured, however, that the end and aim of his Government is the pro-

have not been blind must know that it has frequently been treated as a favored litigant. That is not as it should be. When the Government enters litigation with its citizens, it must stand as an equal and must toe the same mark private litigants must come to. It is hard to conceive that a private litigant could make a test run in one jurisdiction and fail, and then start a proceeding in another jurisdiction and get his action to trial on the merits with such speed while, at the same time, the former action was pending and undisposed of, or was improperly dismissed.

IV.

The Government takes the position that appellant has no stake in the continued pendency of the prosecution first brought. That position is untenable. If it should be held that the motion to dismiss that indictment should have been overruled, the parties litigant will have two cases pending in separate jurisdictions and involving the same subject matter. The respective courts called upon to deal justly as between the parties will exercise their respective discretions, having due regard for the dictates of justice as well as for the comity usually observed in such matters.[13] We so held in *Illinois Central* v. *Bullock*, 5 cir. 1950, 181 F.2d 851. The Government argues that,

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tection of his freedom and his 'rights'. In an even broader sense, justice to the individual is its aim. History tells him that those 'rights' were established by litigants with the courage to combat tyrants who sought to deny them, before judges who had the courage to uphold them. In such contests our profession has supplied both the adversary advocates and the judges. The latter have been set apart and charged with responsibility of seeing that justice be done to the individual and to the Government. * * * The seal of the Department of Justice to which they belong contains a motto, '*Qui pro Domina Justitia Sequitur*'. It appears on the flag which flies over the Department's office. Liberally translated, 'The Department of Justice Prosecutes In Behalf Of Our Lady Justice'."

[13] Cf. Lydick v. Fischer, 5 Cir. 1943, 135 F.2d 983.

under *Carpenter* v. *Edmonson*, 5 Cir. 1937, 92 F.2d 895, the District Court for the Western District of Texas would have no discretion but to proceed to hear the case it elected to press. That argument too is unsound. The *Carpenter* doctrine was considerably weakened by *McLain* v. *Lance*, 5 Cir. 1944, 146 F. 2d 341, and was repudiated in the *Bullock* case, *supra*. The law now is that each judge called upon to try a case pending also in another jurisdiction has the right and duty to exercise a judicial discretion as to whether the case will be tried or not.

If that situation should come to pass, it would be incumbent upon the District Court for the Southern District of Texas, and the District Court for the Western District of Texas, each to exercise discretion as to which case should be tried. It may be that discretion so exercised would lead to the conclusion that the cases should be disposed of in the order of their filing. That would not be inconsonant with practices frequently observed.[14] The two courts would, of course, exercise discretion according to their own judgments. The suggestion is made merely to indicate that the Government's argument is wrong and that appellant does have a definite legal interest in the continued pendency of the first prosecution.

V.

It is plain that we have all elements of this controversy before us and are able to do full justice to the parties independently of the question of the appealability of the dismissal order. It is clear that the Court of the Southern District applied the wrong tests in deciding that the indictment first brought might be dismissed. If it had required the Government to establish a sound legal reason for the dismissal, giving due consideration to the rights of both parties, it is difficult to conclude that the right to dismiss would have been sustained, so barren is the record of any such showing. When all of the talk is boiled down,

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[14] Cf. Niehaus, et al. v. Magnolia Textiles, 5 Cir. 1949, 175 F.2d 977, and the companion case; Magnolia Textiles, Inc. v. Gillis, et al, Sup. Ct. Miss. 1949, 41 So.2d 6.

it points to the fact that the Government was wholly displeased with the prospect of a trial in a venue the court had adjudicated to be fair.

That judgment transferring the case to the Laredo Division had been reached after full hearing and at manifestly great expense to the Government and appellant. To permit the Government to turn its back upon the entire proceeding conducted in a venue of its own selection, giving it, at the same time, a second choice of venue, and to put the appellant to trial with the added expense which would obviously be entailed, would, under the facts clearly appearing in the record before us, be unjust and in derogation of appellant's rights.

The authorities discussed in III *supra* furnish a clear blueprint of means by which we may do full justice between the parties. I think we should permit the Petition for Mandamus and Prohibition to be filed, and should take full charge of the entire litigation, either (a) preserving the *status quo* while proceeding to hear the appeal on its merits; or (b) reversing the dismissal order for rehearing by the Court of the Southern District guided by proper standards of proof and decision; or (c) ordering that the case in the Western District be transferred to the Southern District and consolidated with the case originated there, and that trial proceed in the Laredo Division. By following one of these alternatives, or a combination of them, we can proceed to grant appellant the protection to which I think he is entitled and can dispense justice which will be effective and not sterile.

These are the grounds of my dissent.

A True Copy:
Teste:

JOHN A. FEEHAN, JR.
Clerk of the United States Court of Appeals for the Fifth Circuit.

Nos. 320 and 202 Misc.

IN THE

Supreme Court of the United States

October Term, 1955

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v.

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BEN H. RICE, *District Judge*

GEORGE B. PARR, *Petitioner*

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BEN H. RICE, *District Judge*

GEORGE B. PARR, *Petitioner*

v.

JAMES V. ALLRED, *District Judge*

REPLY MEMORANDUM OF THE PETITIONER

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REPLY MEMORANDUM OF THE PETITIONER

Petitioner is here seeking relief from an attempt by the Department of Justice to a valid judicial order of transfer under Rule 21 of the Federal Rules of Criminal Procedure. We contend on the merits that the order of the court required that the prosecution continue, if at all, in Laredo, the division to which the case was transferred, that the Government had no right

to ask either for a transfer or a retransfer and that the device of dismissal and reindictment invented by the Government for this case is flatly inconsistent with the applicable Rules.

The entire purpose of the Government's argument in opposition is to escape a judicial determination of the propriety of the procedure which it used to accomplish the effect of removing the trial of this case from the district to which it had been transferred by previous order of the court. The central issue whether the plain and mandatory provision of Rule 21 has been violated by the device used by the prosecution to transfer the case to a district of its own choice is ignored. Except for an unsupported assertion in a footnote the Government's entire brief is devoted to highly technical grounds designed to prevent this Court from considering this central issue.

We say that the issue whether a proper interpretation of Rule 21 and Rule 48 gives the Government the power to transfer a case in violation of the mandatory language of Rule 21 cannot be evaded by the Government. A short analysis of the Government's procedural objections to a decision on the merits we believe will demonstrate this.

In its first procedural argument (Gov. Br. 8) against the Court's reaching a decision on the merits the Government assumes that the order to dismiss the first indictment has no legal connection with the bringing of a second indictment for the purpose of removing the trial from the district to which it had been transferred. If this assumption be indulged of course the order cannot be appealed since considered apart from the second indictment it is, on its face, in favor of the petitioner. To make that assumption, however, is to

beg the question. We think we have demonstrated in our petition that under no fair interpretation of the Rule can an order of dismissal made for the purpose of the transfer of the case be considered apart from that purpose.[1] The Government has not chosen to answer this argument. Instead it chooses to assume without argument that our position is not valid and to argue from that assumption that the order is not appealable.

The Government's second and alternative procedural argument (Gov. Br. 9) assumes that the petitioner is right in contending that the order of dismissal is part of a device to transfer the case in violation of the Rule. On the basis of that assumption the Government argues that the order is not appealable because it is interlocutory and not final.

It seems clear to us that the order of dismissal is a final order which should be reversed because it is an abuse of the court's discretion. It was entered in plain violation of the mandatory provision of Rule 21. It is appealable on that ground and therefore the Government cannot escape a decision on the question of whether Rule 21 has in fact been violated. The refusal of the court to follow a mandatory provision of law may also be reviewed on a prerogative writ. Therefore, a decision on the merits cannot be escaped on this procedural ground.

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[1] The Government cites *Lewis* v. *United States*, 216 U.S. 611 (1910), where an appeal from the dismissal of an indictment was dismissed because moot. The Court specifically qualified its holding to the case where "no new indictment [had] been returned against him within three years . . ." Needless to say, petitioner here would not have appealed the dismissal of his first indictment had it not been for the second.

As a third procedural objection to a decision on the merits of this case the Government contends (Gov. Br. 9, 10) that Judge Kennerly properly exercised his discretion because he heard testimony by the United States Attorney to the effect that the purpose of his motion to dismiss was to remove the case from the district to which it had been transferred.[2] This again begs the question. We say that under a proper interpretation of Rules 21 and 48 a dismissal for the purpose of transferring the case was a violation of Rule 21 and, therefore, an abuse of discretion. Thus this procedural ground also raises the central issue in the case.

The Government's final argument against the Court's deciding the merits of this case (Gov. Br. 11, 12) is that the issues presented here may be raised on appeal from a conviction after trial in the Western District. The Government undoubtedly will contend that the Western District has general jurisdiction to try petitioner for the same offense that was charged in the first indictment even if it obtained that jurisdiction erroneously: that is, in disregard of the defendant's rights under the Rules and the transfer order. The only relief which petitioner can get after

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[2] The Brief of the Government states:

> "Judge Kennerly was well aware of the problems which would confront the Government if trial were had at Laredo . . ." (Br. 10).

This should not be interpreted as meaning that he agreed that there were "problems". It is true that the prosecuting attorney objected vigorously to the transfer to Laredo. It is also true that the court specifically found, in ordering the transfer that:

> "I do not think that the evidence shows that the Government either will or might be under severe handicap . . ."

in that venue. (R. 35).

conviction in the Western District would be on a showing that he had not had a fair trial there. Such an issue is entirely different from the one that petitioner raises here.[3]

In substance the Government is here seeking to establish the power to remove a criminal trial from the district to which it has been transferred by the device of dismissal and reindictment. It wants to try petitioner in the district of its own choice regardless of the transfer order, and thus put him in a situation where he will be unable to assert the rights which we contend the order of transfer gave him. The question is whether or not such procedure violates the mandatory provisions of Rule 21 as to the place of trial when a case has been transferred. We think this issue presents a most important question of criminal procedure. If we are right on the importance of the issue certainly the Government can-

[3] We rely on *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329 (2d Cir. 1950), cert. den. 340 U.S. 841 (1950). The Government does not challenge that case, or its relevance to this one.

not escape a decision on the merits by the procedural legerdemain which constitutes its brief in opposition.

Respectfully submitted,

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October, 1955

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Supreme Court of the United States

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IN THE

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v.

BEN H. RICE, *District Judge*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITIONER'S BRIEF

I.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 225 F. 2d 329. The opinion of the District Court for the Southern District of Texas transferring the indictment from the Corpus Christi Division to the Laredo

Division is reported in 17 F. R. D. 512 (R. 8). His oral opinion dismissing that indictment has not been reported. It is printed at R. 78.

II.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254 (1). The judgment of the Court of Appeals was rendered on July 13, 1955 (R. 92). The petition for writ of certiorari was filed on August 12, 1955. The writ was granted on October 17, 1955 (R. 132).[1]

In *Parr* v. *Rice* and *Parr* v. *Allred*, No. 202 Misc., October Term, 1955, petitioner also applied for prerogative writs in this Court to compel trial in Laredo. This Court has jurisdiction to issue the writs under 28 U.S.C. § 1651.

III.

STATUTES AND FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED

28 U.S.C. § 1651:

> "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

28 U.S.C. § 1291:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district

[1] The Court's order granting certiorari reads in part as follows: "The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case will be heard on the merits and on the question of appealability."

courts of the United States ... except where a direct review may be had in the Supreme Court."

"RULE 21. TRANSFER FROM THE DISTRICT OR DIVISION FOR TRIAL.

"(a) *For Prejudice in the District or Division.* The court upon motion of the defendant shall transfer the proceeding as to him to another district or division if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division.

"(b) *Offense Committed in Two or More Districts or Divisions.* The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged.

"(c) *Proceedings on Transfer.* When a transfer is ordered the clerk shall transmit to the clerk of the court to which the proceeding is transferred all papers in the proceeding or duplicates thereof and any bail taken, and the prosecution shall continue in that district or division."

"RULE 48. DISMISSAL.

"(a) *By Attorney for Government.* The Attorney General or the United States Attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant."

IV.

QUESTIONS PRESENTED

1. When the Government obtains an indictment in a venue where the defendant cannot get a fair trial and for that reason the trial court, on motion of the defendant, following a hearing and consideration of evidence, transfers the case to a venue where it finds neither side will be at a disadvantage, does the Government have the privilege of avoiding trial in the division to which the case has been transferred by obtaining another indictment charging the identical offense in another venue and then dismissing the transferred indictment?

2. Is an order and judgment by a trial court dismissing a transferred indictment a final judgment within the terms and provisions of 28 U.S.C. § 1291? Is it an appealable order within the rule of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)?

3. May writs of mandamus and prohibition issue from a court of appeals to require that "the prosecution . . . continue" pursuant to Rule 21(c), F.R. Crim. P., in the district and division to which a first indictment was transferred by order of court on defendant's motion, rather than in another district and division selected by the prosecution by the device of a second indictment?

V.

STATEMENT OF THE CASE

This case involves an attempt by the Government to circumvent an order of transfer entered by a court under the provisions of Rule 21(a) of the Federal Rules of Criminal Procedure.

Petitioner Parr is a prominent figure in the State of Texas. For some years prior to the institution of this proceeding, he had been subjected to heated newspaper attacks on his honesty and character, particularly in the Corpus Christi Division of the Southern District of Texas (R. 14-16, 119-122).

The City of Austin, Texas, is headquarters for the First Internal Revenue Collection District of Texas. The City of Corpus Christi is located in that District. For the last twenty years, the Government has filed all tax evasion cases arising in that District in Austin (R. 38).

However, on November 15, 1954, the Government departed from this practice of more than two decades and, in the Corpus Christi Division of the Southern District of Texas, procured an indictment charging petitioner in three counts with evasion of income taxes (R. 1).

Petitioner filed a motion under Rule 21(a) of the Federal Rules of Criminal Procedure to transfer that indictment on the ground that he could not obtain a fair and impartial trial at Corpus Christi (R. 119). The Government strenuously opposed the change (R. 13-14, 123-131). After extensive hearings and consideration of more than one hundred affidavits and perhaps five hundred newspaper clippings from the Corpus Christi press (R. 78), on April 27, 1955, District Judge Kennerly filed an opinion concurred in by District Judge Allred (R. 8-19), specifically finding that (R. 15):

> "A preponderance of the evidence reflected by such affidavits—and I have no doubt on the subject and find—*that there exists in the Corpus Christi Division of the Court so great a prejudice*

> *against Defendant that he cannot obtain a fair and impartial trial in this case in such division.*" (Italics added)

Judge Kennerly transferred the case to the Laredo Division of the Southern District of Texas (R. 29). The United States Attorney had argued that a transfer to that Division would "handicap" the prosecution (R. 18). Judge Kennerly rejected this contention and specifically found that trial in Laredo would in no way prejudice the Government (R. 19):

> "Basing my findings, as I must, wholly on all the affidavits, *I do not think that the evidence shows that the Government either will or might 'be under a severe handicap' in the prosecution of this case as claimed. I find to the contrary.*" (Italics added)

The Government did not seek review of the transfer order. However, it soon became apparent that the Government had no intention of conforming to the court's ruling that trial should be had in Laredo. On May 3, 1955, six days after the aforementioned opinion was filed and actually prior to the formal entry of the transfer order (R. 29), the Department of Justice in Washington authorized the local United States Attorney to dismiss the Southern District indictment if an identical indictment could be obtained in the Western District (R. 20). On the same day, the United States Attorney obtained an indictment in the Western District which was identical with the indictment which had been transferred to Laredo (R. 111).

The very next day, on May 4, 1955, the United States Attorney filed his motion in the Laredo court to dismiss the first indictment under Rule 48(a) of the Federal Rules of Criminal Procedure (R. 19), to

which was attached his authorization and the second indictment. His Statement of Reasons for Dismissal (R. 22) recited that the Government had originally chosen to prosecute petitioner in Corpus Christi; that the choice was made prior to the transfer order; but that the "recent decision of the Court to transfer venue from Corpus Christi to Laredo" had disturbed the Government's "over-all appraisal" of the strategy of the proceeding (R. 22-24). Laredo, it reiterated, was unsatisfactory to the Government (R. 23):

> "At the present time, because of new factors introduced in the situation, the Attorney General believes that prosecution should be had in the Western District of Texas and has initiated action accordingly."

On May 16, Judge Kennerly conducted an inquiry into the reasons for the dismissal, received testimony by Government counsel and heard argument (R. 34-77). The Government did not and could not disguise the fact at this hearing that its objective was to nullify the court's order entered after full hearing, fixing Laredo as the place of trial. The United States Attorney stated that the Government had brought an indictment "similar in all respects" in the Western District (R. 39). He said that the Government did not want to proceed in Laredo because, despite the court's finding that it would not be handicapped in that forum, it anticipated difficulty in eliciting the testimony of witnesses (R. 41).

The Government summarized its position as follows (R. 53):

> "I think it has been very clear from several documents we have filed that we would have preferred

> the case to remain in Corpus Christi, and it is certainly clear from the action of the Attorney General and myself that the Attorney General prefers that the case go to Austin . . ."

Petitioner vigorously opposed the dismissal. He argued that the sole purpose of the dismissal was to nullify the order transferring the case to Laredo. The Government, he said, could not thus circumvent an order duly entered, and could not by this method secure for itself a right to transfer the case which is not allowed by the rules. He urged the court, pursuant to its power under Rule 48(a), to deny the motion (R. 60-77).

Judge Kennerly ruled from the bench that he was compelled to grant the motion (R. 78-80). He held in effect that during 24 years on the bench he had never "hesitated to dismiss a case when requested by the Government" (R. 79). He added that:

> "*If* I have a discretion under the rules now as to whether this case should or should not be dismissed, I *must* exercise that discretion and allow it to be dismissed . . ." (Italics added) (R. 79).

Petitioner duly appealed to the Court of Appeals for the Fifth Circuit from the order of dismissal (R. 81).

Pending that appeal, petitioner filed his motion to stay proceedings on the second indictment which had been brought in the Austin Division of the Western District (R. 113). This was denied by that court on June 7, as was a motion to dismiss the second indictment on June 13 (R. 87). On June 29, the court also denied a motion under Rule 21(b) that the second indictment be transferred to Laredo in the interest of justice (R. 88). The motions were based on the contention that trial in

Austin should not go forward on an offense identical with that charged in the previous indictment which had been validly and effectively transferred to Laredo. Following denial of these motions in the Austin court, petitioner sought writs of prohibition and mandamus in the Court of Appeals, to prohibit the Austin court from proceeding with the trial of the second indictment, so that the case might proceed in Laredo, and for other relief (R. 84-90).

The Court of Appeals, two to one, dismissed the appeal. The majority did not reach the merits. They thought the order of dismissal was not a "final order". They said only that the "effect of the order sought to be appealed from is simply that the United States has elected to discontinue, and has discontinued, the prosecution returned in the Southern District of Texas . . ." and *"therefore"* that the dismissal is "not final but discretionary and interlocutory and not appealable", 225 F. 2d at 332 (R. 96). The court did not separately consider the application for the writs directed to the Austin judge, but held that it "follows" that the writs must also be denied, *id.* at 333 (R. 97).

Judge Cameron dissented. He stated that, under the new rules, venue is no longer the prime "prerogative" of the Government; the district court has an obligation to supervise the choice of venue to "insure justice and equal treatment to all parties"; and that it was doubtful "whether that purpose and that meaning have been vindicated here," *id.* at 337-338 (R. 104-106). He further said:

> "The Government made its selection of the battleground in the first instance as it had a right to do. The court found that battleground to be too favorable to the Government and unfair to the de-

fendant. The court changed the battleground to one it adjudicated to be favorable to neither side. To permit the Government, under those circumstances, to repudiate the whole proceeding it had initiated and to move the scene of the fight to another place of its own selection, is to open the door to the possibility of grave abuses . . . ." *Id.* at 338 (R. 107).

"It is clear that the Court of the Southern District applied the wrong tests in deciding that the indictment first brought might be dismissed. If it had required the Government to establish a sound legal reason for the dismissal, giving due consideration to the rights of both parties, it is difficult to conclude that the right to dismiss would have been sustained, so barren is the record of any such showing. When all of the talk is boiled down, it points to the fact that the Government was wholly displeased with the prospect of a trial in a venue the court had adjudicated to be fair." *Id.* at 340 (R. 110).

Judge Cameron felt that the court had all the elements of the controversy before it, and that it should reach the merits and should "do full justice to the parties" either by ruling on the appeal or by issuing the prerogative writs so that the trial would proceed in Laredo, the venue previously fixed by order of the District Court, *id.* at 340 (R. 110).

Judge Cameron, we think, correctly and succinctly stated the basic issue in this entire proceeding by saying:

"If it be thought that the views here expressed give hospitality to the concept that the Government does not belong in a favored-litigant class, they are so intended . . . It is hard to conceive that a private litigant could make a test run in

order and the court should thus have exercised its functions and duties under the Rule by denying leave to dismiss.

C.

1. The dismissal order was final, within the terms of 28 U.S.C. § 1291, since it "terminated" the proceedings by virtue of Rule 48. The pendency of the second indictment in another district did not change the plenary character of the order. Petitioner was aggrieved by it, in view of the fact that it denied him the right to trial in Laredo, which the court had adjudicated to be fair to both sides. None of the purposes of the final judgment rule were served in dismissing the appeal, in view of the fact that it represented the last time the petitioner could challenge the propriety of the dismissal order. But even if the order was not final, it was appealable under the principles of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

2. Even if no appeal would lie from the dismissal order, the Court of Appeals should have compelled trial in Laredo, through the issuance of prerogative writs, as requested, to the Austin Court.

VII.

ARGUMENT

A. The Government Should Not be Permitted to Circumvent an Order of Transfer Entered Under Rule 21(a) by Reindictment and Dismissal of the Transferred Indictment

This case presents a highly important question in the administration of justice under the Federal Rules of Criminal Procedure. It breaks new ground. Neither this Court nor any other federal court has been called

upon to decide whether an order of transfer validly entered under Rule 21(a) can be evaded and rendered a nullity through the device of reindictment and dismissal of the transferred indictment.[2] The novelty of this question in the federal courts doubtless arises from the fact that, prior to the effective date of the Federal Rules in 1946, a defendant charged with crime in a federal court was unable to secure a change in venue upon the ground of prejudice in the area in which the charge was pending.[3] Consequently, until the adoption of Rule 21, the question of circumventing such a transfer order could not have arisen in a federal court.

The petitioner was first indicted for income tax evasion in the Southern District of Texas, Corpus Christi Division. He moved for a transfer of the proceedings under Rule 21(a), on the grounds that he would be denied a fair trial because of prejudice there. In support he submitted extensive proof. The Government opposed the transfer, and submitted its own proof. The court heard argument. It held that petitioner could not get a fair trial in the forum which the Government had chosen. It also found that the Government would be under no "handicap" by a transfer to Laredo. It entered an order transferring the case to the Laredo Division.

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[2] It might be noted, however, that the federal courts have long condemned the practices of obtaining multiple indictments for the same offense, *United States* v. *Haupt*, 152 F. 2d 771, 795 (7th Cir. 1945), affirmed 330 U.S. 631 (1947), of dismissing an indictment for any reason except lack of evidence, *United States* v. *Doe*, 101 F. Supp. 609, 611 (D.C. Conn., 1951), and of dismissing one indictment and obtaining a second indictment for the same offense, *United States* v. *Jones*, 7 Alaska 378, 381-382 (1926).

[3] Cummings, *The Third Great Adventure*, 29 A.B.A.J. 654, 655-6 (1943).

Rule 21(c), which governs the effect of such transfer orders, is clear and explicit:

> "When a transfer is ordered the clerk shall transmit to the clerk of the court to which the proceeding is transferred all papers in the proceeding or duplicates thereof and any bail taken, *and the prosecution shall continue in that district or division.*"

This is a mandatory requirement that, once there has been an order of transfer, the prosecution shall continue in the second court. In the practice of a number of the states a transfer of venue by a court invests the transferee court with exclusive jurisdiction.[4] The law in such states can be illustrated by that of Texas. There a change of venue is accomplished by what is called a plea of privilege. The effect of such a plea is stated in 26 *Texas Jurisprudence* 102 (1933):

> "... a judgment on a plea of privilege is conclusive of the issue of venue, and this is true even though the plaintiff takes a voluntary non-suit after its rendition."

The quoted language of Rule 21(c) makes it clear that the Rule is designed to conform federal practice to this aspect of state procedure.

Although the strategem of evading transfers of venue by reindictment and dismissal has not heretofore been before the federal courts, such practice has been severely criticized in decisions of state courts. In *Ex Parte Lancaster*, 206 Ala. 60, 89 So. 721 (1921), the defendant was indicted for murder in Walker County and, on his motion asserting prejudice, the

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[4] See e.g., *Turner* v. *State*, 87 Fla. 155, 162, 99 So. 334, 336 (1924); *Keefe* v. *District Court*, 16 Wyo. 381, 391, 94 Pac. 459, 461 (1908).

court transferred the proceeding to Marion County. The prosecution then dismissed the indictment in Marion County and obtained a new indictment in Walker County. In forbidding trial of the second indictment, the court said (206 Ala. at 64-65, 89 So. at 724-725):

> "Neither the Constitution nor the statutes of Alabama authorize the state to apply for or to secure a change of venue in any criminal case. Will the courts allow the state to secure a change of venue indirectly when it is not permitted directly to do so? What cannot be done directly by law, the law does not permit to be done indirectly. No change of venue can be granted by a court in a criminal case, except on application, petition, or motion of the defendant. The defendant must be the moving party for the change of venue, and not the state.
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> * * *
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> "To give the state this right to have the trial returned to Walker county would deprive the defendant of his right to be tried in Marion county for this offense. This would allow the state a change of venue, if permitted. The defendant cannot be deprived of this right to be tried in Marion county by motion of the state for a nolle prosequi to be entered, which is granted by the court. Neither the Constitution nor the statutes of Alabama ever contemplated that the defendant could in that way be deprived of his right of trial for the offense charged in Marion county. *To permit it, the state, with the approval of the court, by entering a nolle prosequi, could accomplish indirectly what the statute directly forbids, namely, a change of the trial of the defendant on the offense charged* from Marion back to Walker county, or some other county, perhaps.
>
> "*This court cannot approve or encourage or permit such practice.* It will set no such precedent. It

> cannot permit a defendant to be liable to be harassed in that way." (Italics added)

Coleman v. *State*, 83 Miss. 290, 35 So. 937 (1904), also involved an attempt by the prosecution to obtain a transfer, otherwise denied it, by the technique of dismissal and reindictment. The Court said (83 Miss. at 298, 35 So. at 939):

> "The trial could not, on the application of the state, have been transferred to any other county because this is not permitted by law, and the method here adopted is simply an attempt to do by indirection what cannot be done directly."[5]

In short, state law is clear that the prosecution cannot create for itself a transfer power, by a misuse of the power to terminate, which is denied it in terms. We think that Rule 21 compels a similar result in the federal courts. The notes of the Advisory Committee demonstrate that transfer, where justified, is a privilege to be accorded defendants, not the Government. They state:[6]

> "3. The rule provides for a change of venue only on defendant's motion and does not extend the same right to the prosecution . . ."

Nothing in Rule 21 permits the Government to request a transfer, either on grounds of prejudice to it or "in the interest of justice". If the Government's technique of dismissal and reindictment is sanctioned,

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[5] See also *State* v. *Milano*, 138 La. 990, 991, 71 So. 131 (1916); *Keefe* v. *District Court*, 16 Wyo. 381, 392, 94 Pac. 459, 461 (1908).

[6] Notes on Advisory Committee on Rules, 18 U.S.C.A., Rule 21, p. 243.

it indeed will be enabled "to do by indirection what cannot be done directly."

Where offenses have been committed in more than one district, the Government initially has an unfettered choice to fix venue in a location of its own choosing. The defendant cannot interfere with this choice before the indictment is returned, but, after he has been indicted, protection is afforded him by Rule 21. If, as in the instant case, the Government makes an initial choice of an unfair venue, certainly it should be required to try the case in the forum which the court decides, on defendant's motion to transfer, is a fair one to both sides. Otherwise, the Government can make a succession of choices. It can begin with the worst venue for the defendant; if the case is transferred, it can retransfer the prosecution to the next most prejudiced locality; and so on. The practice threatens, just as did the transfer procedure presented in *United States* v. *National City Lines, Inc.*, 334 U.S. 573, 591-592 (1948), a "merry-go-round of litigation upon the issue".

In the present case, the Government had for more than twenty years tried all tax fraud cases in Austin, but it chose to obtain an indictment against petitioner in Corpus Christi. When the case was transferred to Laredo, the Government suddenly decided that it should resume its theretofore uniform practice and try petitioner in Austin. The same judge would have conducted the trial, whether it went forward in Corpus Christi or in Laredo. The Government's initial preference to try the case in Corpus Christi must have been due to its desire to avail itself of the prejudice there. Then, after the court discerned such prejudice

and found that neither side would be prejudiced by trial in Laredo, the Government decided to circumvent this finding and again to insist upon a forum of its own choice. Such shopping around for an illegitimate advantage should not be sanctioned by this Court.[7]

Prior to the adoption of the Federal Rules of Criminal Procedure, the Government had the final choice of venue. The persons who drafted the Rules made it plain that they desired to change such practice, saying with respect to Rule 21:[8]

> "The effect of this provision would be to modify the existing practice under which in such cases the Government has the final choice of the jurisdiction where the prosecution should be conducted. The matter will now be left in the discretion of the court."

The court exercised its discretion here. It found that petitioner would be prejudiced in Corpus Christi. It also found, upon due consideration of the proof, that the Government would be at no disadvantage in Laredo. When the case was transferred to Laredo, the Government had all that it was entitled to—its day in court on the fair place of trial. It originally sought an unfair advantage in Corpus Christi. That advantage was taken away by the change to Laredo. If as a re-

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[7] The language of *Hampton* v. *Williams*, 33 F. 2d 46, 49 (8th Cir. 1929) is applicable here: "Congress did not intend that a party could voluntarily proceed in the court where the suit was filed until he became dissatisfied and then transfer the case. It gave him the privilege to go ahead in one or the other courts, as he desired, but he could not experiment with both."

[8] Notes of Advisory Committee on Rules, 18 U.S.C.A., Rule 21, p. 242.

sult of picking an unfair forum if lost the chance to prosecute at Austin, the Government has learned the risks of an original unfair choice.

The Government could have sought appellate relief from the transfer order if it felt the district judge was wrong and that it really would have been prejudiced in Laredo.[9] Instead of proceeding in this orderly fashion, however, it attempted to circumvent the court's decision: Its action is a fundamental evasion of the integrity of the transfer procedure contemplated by Rule 21.

B. Judge Kennerly Misconceived His Functions and Obligations in Permitting the Government to Dismiss the First Indictment Under Rule 48(a).

Rule 48(a) provides that the Government may secure a dismissal only "by leave of court." Prior to the adoption of this Rule, the prosecution had sole discretion over the matter of dismissals. The Advisory Committee recommended that such practice be continued, but this Honorable Court rejected the recommendation and inserted the requirement that leave of

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[9] As the Court pointed out in *United States* v. *United States District Court*, 209 F. 2d 575, 576 (6th Cir. 1954), with respect to the propriety of a transfer order under Rule 21(a):

> "Mandamus or a proceeding in the nature of mandamus is the appropriate procedure by which to decide the issue presented."

Thus, the Government can scarcely argue that it could not have tested the order here in an orderly and proper fashion. See also *General Portland Cement Co.* v. *Perry*, 204 F. 2d 316 (7th Cir. 1953); *Paramount Pictures* v. *Rodney*, 186 F. 2d 111 (3d Cir.), *cert. den.* 340 U.S. 953 (1951).

the court be had.[10] As a result, the Committee's final notes state:[11]

> "The first sentence of this rule will change existing law. The common-law rule that the public prosecutor may enter a nolle prosequi in his discretion, without any action by the court, prevails in the federal courts . . . This provision will permit the filing of a nolle prosequi only by leave of court. This is similar to the rule now prevailing in many states."

Clearly, the Rule contemplates that the court is to assume more than a passive role in approving dismissals. The Government's motion must receive the sanction of the court.[12]

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[10] 225 F. (2d) at 337, note 8 (R. 105).

The Advisory Committee on Rules of Criminal Procedure originally recommended that the Court adopt what is now Rule 48(a) in the following form:

> "The Attorney General or the United States attorney may file a dismissal of the indictment or information with a statement of the reasons therefor and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant." Federal Rules of Criminal Procedure, Preliminary Draft (1943).

The Committee thus originally contemplated no change in the existing law. It said, with respect to its recommendation: "In the federal courts the prosecutor retains his commonlaw power to enter a *nolle prosequi* without the consent of the court." *Id.* at 191.

[11] Notes of Advisory Committee on Rules, 18 U. S. C. A., Rule 48, p. 537.

[12] See *United States* v. *Doe*, 101 F. Supp. 609 (D. C. Conn. 1951), wherein the court denied such a motion on the ground that

As the dissenting judge in the Court of Appeals demonstrated,[13] Judge Kennerly failed to recognize his obligations under the new rules. He stated that during his 24 years on the bench, he had always granted motions to dismiss. He felt that if he had "discretion", he "must exercise it" and "allow" the indictment to be dismissed (R. 79).

Judge Kennerly clearly assumed that he had no discretion to deny the Government's motion to dismiss, or that if he had a measure of discretion, it was so limited and circumscribed as to be practically unavailable. We respectfully submit that this is an erroneous view of the Rule. This Court overruled its Advisory Committee and required that "leave of court" be obtained prior to dismissal of an indictment for the purpose of directing the district courts to exercise affirmative judgment in the interests of justice and or-

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the Government had not shown the reasons for the dismissal. In this respect the court said (*id.* at 611):

> "In my view, the rule contemplates that the court shall exercise a sound discretion in the premises. And on fundamental principles, at least in the absence of very exceptional circumstances as for instance where the defendant has received a substantial sentence for another phase of the same offense, *a court may not properly approve a dismissal of the entire case against any given defendant unless satisfied that the Government lacks sufficient evidence to warrant a prosecution.* Especially is this so where the matter is before the court on indictment as distinguished from information." (Italics added).

On the necessity and importance that district judges exercise a firm hand in the supervision of dismissals, see Yankwich, *Increasing Judicial Discretion in Criminal Proceedings*, 1 F. R. D. 746, 747-752 (1941).

[13] 225 F. 2d at 337 (R. 105).

derly procedure. It did not insert the requirement as a mere formality. Indeed, the present case is precisely the kind of situation which demonstrates the wisdom of the requirement, and in which the trial court should have used its power to refuse dismissal. Dismissal was sought by the prosecution for reasons which are distinctly improper. It was sought in order to circumvent an order of the court, entered on the evidence, fixing the fair place of trial. It was sought in order to obtain for the Government, in fact if not in form, a right to transfer a pending criminal case to another venue, a right which Rule 21 gives exclusively to the court and exclusively on motion of the defendant; and which the Rule deliberately withholds from the Government.

We respectfully submit, therefore, that Judge Kennerly should have exercised his power with respect to the motion for leave to dismiss, and should have denied leave in order to protect the prior order of the court fixing the place of trial, and to secure to the defendant the benefit of that order. Failure to do this amounted to judicial condonation of a device by which the Department of Justice seeks to obtain for itself, and to deny to the courts, the power to choose the forum to which trial of a criminal case may be transferred, contrary to the Rules.

In granting leave for dismissal of the indictment, Judge Kennerly stated (R. 79):

> ". . . I do not think that the defendant, either in the hearing this morning or in this enormous record on the question of change of venue, has shown any reasons why this case should not be dismissed."

This is clearly incorrect. The reasons why defendant opposed the dismissal were established by the record. The facts are not in dispute. Indeed, the very facts relied upon by the Government to justify the dismissal—that is, to permit the case to be tried in a forum more favorable to the Government than that fixed by the court's order—are the facts which demonstrate that dismissal should not be allowed.

The only reason for the dismissal which the Government advanced was that, since the transfer of the case to Laredo, it had developed a sudden and most acute preference for trying the case in Austin. Surely this is not a sound basis for dismissing an indictment and thereby sanctioning the circumvention of a valid transfer order. Rule 21(a) and the rulings of courts thereunder are not subject to being overruled by the Attorney General and his assistants. The requirement of Rule 48(a) that leave of court be obtained before dismissal of an indictment was clearly designed to prevent abuse of the dismissal power of the prosecutor for the purpose of obtaining improper advantages. Using that power to circumvent an order of court and to obtain, in effect, the transfer of trial of a case, is certainly improper.

C. The Court of Appeals Had Jurisdiction to Grant Petitioner Full Relief.

As we have pointed out, petitioner carried an ordinary appeal to the Court of Appeals under 28 U. S. C. § 1291, and he also sought prerogative writs in that court. The majority dismissed the appeal and denied the writs "for want of finality in the order appealed from", 225 F. 2d at 332 (R. 97). The writ of certiorari thus brings to this Court two pro-

cedural issues: (1) the appealability of the dismissal order in the Southern District Court, and (2) the power of the Court of Appeals to supervise the proceeding on the second indictment in the Western District by prerogative writs. We submit that the dismissal order was a final, appealable order. We also submit that regardless of its finality the Court of Appeals should have granted petitioner full relief by issuance of the prerogative writs prayed for.

I. Appealability.

(a) *Finality.* 28 U. S. C. § 1291 establishes appellate jurisdiction of "final decisions" of the district courts. Finality, of course, "is not a technical concept of temporal or physical termination", *Cobbledick* v. *United States*, 309 U. S. 323, 326 (1940); whether a motion and order "is to be treated as independent and plenary or as merely a procedural step in a pending trial must be determined by particular circumstances." *United States* v. *Wallace & Tiernan Co.*, 336 U. S. 793, 802 (1949). In the circumstances of the Southern District proceedings, nothing could have been more final than this dismissal order.

The effect of such an order is made clear by Rule 48 itself. This provides that when the prosecutor, with leave of court, dismisses an indictment, "the prosecution shall thereupon *terminate*."[14] (Italics added).

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[14] Compare *St. Louis, I. M. & S. Ry. Co.* v. *Southern Express Co.*, 108 U. S. 24, 28 (1883): a judgment "is final for the purposes of an appeal . . . when it *terminates* the litigation between the parties . . ." (italics added). This phrasing of the rule has often been repeated by the court, see, *e.g.*, *Berman* v. *United States*, 302 U. S. 211, 213 (1937); *Catlin* v. *United States*, 324 U. S. 229, 233 (1945).

So here. Nothing remained to be done; the docket was closed, the bond cancelled and the order of the court granting the bill of particulars made moot. The statute of limitations was no longer tolled by this proceeding.

The doctrine of finality is designed to protect and guard against piecemeal appeals, with concomitant delay of trial in the lower courts. But this was not a piecemeal appeal. The court could enter no other orders in this docket from which an appeal could be taken. The appeal from the judgment of the Southern District Court represented petitioner's last and final opportunity to seek a review; plainly he cannot ask the Court of Appeals to review orders, including the dismissal order, entered in the Laredo docket of the Southern District on an appeal from a possible future conviction in the Austin Division of the Western District. In short, to deny finality to the order of dismissal would render petitioner "powerless to avert the mischief of the order", *Perlman* v. *United States*, 247 U. S. 7, 12 (1918), without serving any of the purposes of the final judgment rule.

The Government in its opposition to our Petition for Certiorari, however, urged the Court to view the Southern District proceeding "in conjunction with the second indictment," and argued that in this guise the dismissal order became merely one "step in the criminal proceeding." (Br. Opp. 9). But the second indictment with respect to the same cause of action could not deprive the order dismissing the first indictment of its finality, for, although they pertained to the same alleged offense, the two indictments represented separate suits in different courts which, from

the procedural standpoint, were completely unrelated. Indeed, we know of no method by which the record relating to the transfer order and the dismissal of the first indictment could be imported into and made a part of the proceedings on the second indictment. Pendency of other, separate proceedings cannot change the final and plenary character of the dismissal order entered on the docket of the proceeding in the Southern District.

(b) *Aggrievement.* In opposing certiorari, the Government also argued that, even though the order of dismissal might be a final order, petitioner was not "aggrieved" by it and, hence, could not appeal. It cited *Lewis* v. *United States*, 216 U. S. 611 (1910), in support of the alleged principle that a defendant cannot be aggrieved by dismissal of an indictment. However, the *per curiam* decision there was based upon the fact that the subject of the appeal was moot, and the case does not announce any general doctrine to the effect that a defendant cannot be aggrieved by the dismissal of an indictment.

The dismissal order here is analogous to a judgment of non-suit in a civil action. The courts have long permitted appeals by defendants from voluntary nonsuits by civil plaintiffs, regardless of the fact that such nonsuits do not reach the merits of the controversy. As said in *Cybur Lumber Co.* v. *Erkhart*, 247 Fed. 284, 285 (5th Cir. 1918):

> "when [the plaintiff] moves for a voluntary nonsuit, and a judgment of nonsuit is entered over the protest of the defendant, the judgment is a final one and reviewable at the instance of the de-

fendant, though not yet pollinate of the merits of the controversy.

The defendant here obtained a final order transferring the case to Laredo. If the effect of this order is denied to him, he is certainly aggrieved, and he is entitled to appeal from the order purporting to withdraw the benefits of the transfer.

c. *Appealability as a collateral order under Cohen.* But, even if it is assumed that the dismissal order was not a final order, the Court of Appeals should have granted relief to petitioner. In *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), and in *Swift & Co. Packers* v. *Compania Colombiana del Caribe*, 339 U. S. 684 (1950), this Court held that appeals will lie from non-final orders in certain circumstances. In reviewing such an order in the former case, the court said (337 U. S. at 546):

> "But this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably."

Precisely such a situation exists in the case at bar. The order dismissing the Laredo suit did not make any step toward final disposition of the merits of the Austen indictment and could not be merged in final judgment in

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[15] *See* also *Massachusetts Fire & Marine Ins. Co.* v. *Schmuck*, 58 F. 2d 130, 131-132 (8th Cir. 1932); *Connecticut Fire Ins. Co.* v. *Manning*, 177 Fed. 893, 894 (8th Cir. 1910); and *Iowa-Nebraska Light & Power Co.* v. *Daniels*, 63 F. 2d 322, 324 (8th Cir. 1933).

the Austin case. When judgment is entered in the Austin case, it will be too late to review effectively the dismissal order, since the question on appeal will be, not whether the Laredo indictment was properly dismissed, but whether petitioner received a fair trial in Austin. As a result of this, the right conferred upon petitioner by Rule 21 will be irreparably lost. Consequently, even if the dismissal order is deemed non-final, it falls squarely within the principles laid down in the *Cohen* and *Swift* cases and is reviewable by way of appeal.

2. Prerogative Writs.

However, even in the event that the court below had no jurisdiction over the appeal, it nonetheless could and should have granted relief through the issuance of prerogative writs to the Western District Court. The use of a second indictment in the Western District to circumvent the valid and binding transfer of the first was in violation of Rules 21 and 48. The judge of the Western District should have refused to proceed, and should have stayed or transferred the proceedings to Laredo. Mandamus and prohibition were therefore proper remedies to compel adherence to the provisions of the Rules.[18] The court below could have ordered the stay, or the transfer of the proceedings to the proper court pursuant to petitioner's district court motion made under Rule 21(b). Compare *Virginia* v. *Rives*, 100 U. S. 313 (1880); *Maryland* v. *Soper*, 270 U. S. 9 (1926).

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[18] Compare *United States* v. *Smith*, 331 U. S. 469 (1947), where this Court reversed the denial of mandamus in the Court of Appeals, in order to compel the district court to vacate its order granting a new trial in violation of Rule 33, F. R. Crim. P.

To use the prerogative writs in this fashion would be entirely proper. The issue of whether or not the Austin court properly proceeded with the second indictment and refused to transfer to Laredo cannot be raised on a future appeal. In *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329, 330 (2d Cir.), *cert. den.*, 340 U. S. 841 (1950), the court held that it had jurisdiction to grant the writs in connection with an order refusing to transfer a civil case since:

> "... any error in the interlocutory order would probably be incorrectible on appeal, for petitioners could hardly show that a different result would have been reached had the suit been transferred."[17]

Likewise, in the instant case if petitioner can seek relief only by an appeal at the termination of the Austin case, he could not show that a different result would have been reached if the case had been tried in Laredo, and he will be confined to the narrow issue of whether he received a fair trial in Austin. For this reason we think that the prerogative writs prayed for were within the jurisdiction of the Court of Appeals, and should have issued.

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[17] In *Atlantic Coast Line R. Co.* v. *Davis*, 185 F. 2d 766 (5th Cir. 1950), the Court of Appeals for the Fifth Circuit has also recognized and applied the principles announced in the *Ryan* case. See also 6 Moore's *Federal Practice* (2d ed. 1953) 96-101, and particularly cases collected in note 65; Wolfson, *Extraordinary Writs in the Supreme Court since Ex Parte Peru*, 51 Col. L. Rev. 977, 990 (1951).

VIII.

CONCLUSION.

The fact that the Government is a litigant does not confer advantages upon it. The fact that a defendant is a prominent figure does not justify putting him at a disadvantage. However, in the case at bar the Government sought to gain an advantage and subject petitioner to a disadvantage by departing from its custom of more than a score of years and indicting petitioner in Corpus Christi. When the Southern District Court rectified this overreaching by transferring the indictment to Laredo, a venue it expressly found to be fair to both sides, the Government again sought an advantage and to place the petitioner at a disadvantage by obtaining the Austin indictment and dismissing the one transferred to Laredo. In so doing, it flaunted the order of transfer, overruled the court's determination that Laredo would be fair to both sides, and sought to set itself up as the final arbiter in the matter of venue, in plain contravention of Rules 21 and 48.

Petitioner does not seek to avoid a trial for his purported offense. He merely seeks a trial on that offense in the venue to which he is entitled by the binding order of transfer entered after an elaborate trial of the issue, and which had been determined by plenary judicial proceeding to be fair to him as well as to the prosecution. He prays this Court in the exercise of its supervisory power:

1. To reverse the judgment of the Court of Appeals, and to remand the cause to the District Court for the Southern District of Texas, Laredo Division, with instructions to reinstate the indictment in *United States v. Parr*, Criminal No. 3866.

2. To reverse the judgment of the Court of Appeals, and to direct the issuance of prerogative writs to the District Court for the Western District of Texas, Austin Division, and to Honorable Ben H. Rice, Judge of said Court, directing him to stay further proceedings in *United States* v. *Parr*, Criminal No. 17056, or to dismiss the indictment, or to transfer it to the Laredo Division of the Southern District of Texas in the interest of justice.

3. To grant such other relief and process as may be necessary or appropriate.

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IN THE

Supreme Court of the United States

October Term, 1955

No. 320

GEORGE B. PARR, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

GEORGE B. PARR, *Petitioner,*

v.

BEN H. RICE, *District Judge.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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BEN H. RICE, *District Judge*.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF

The brief of the Government is a sweeping defense of the position that the Attorney General has the absolute right to circumvent Rule 21(a) of the Federal Rules of Criminal Procedure. This Rule relates to the transfer of criminal cases on account of prejudice against the defendant in the forum chosen by the Government for the prosecution of the case.

There is no dispute as to the effect of the Attorney General's action in this case. For 20 years, without exception, the Government had filed income tax

evasion cases only in the Western District of Texas (Austin). It broke this practice in this case to initiate prosecution of this defendant in the Corpus Christi Division of the Southern District. On motion of petitioner under Rule 21 (a), and on the basis of voluminous evidence, the District Court found "so great a prejudice against Defendant that he cannot obtain a fair and impartial trial in this case in such division." (R. 15). Accordingly, the Court transferred the case to the Laredo Division, finding that the evidence does not show "that the Government either will or might 'be under a severe handicap' in the prosecution of this case" in Laredo. (R. 19).

Six days later, the Department of Justice in Washington authorized the local United States Attorney to seek an indictment for the same offense in the Western District (Austin) and *if* such indictment were obtained, to dismiss the first indictment which had been transferred to Laredo in the Southern District (R. 20). The second indictment was promptly obtained on the same day. On the next day, the United States Attorney filed a motion to dismiss the first indictment under Rule 48 (a) and subsequently obtained an order permitting dismissal (R. 80).

The effect of the Government's action was to transfer trial of the defendant for the alleged offense to a district of its second choice. Rule 21 (a) "provides for a change of venue only on defendant's motion and does not extend the same right to the prosecution. . . ."[1] The Government's action circumvented the rule, denied defendant the benefits of an order entered after

[1] Notes of Advisory Committee on Federal Rules of Criminal Procedure, 18 U.S.C.A. Rule 21, p. 243.

bitter contest, and amounted to nullification of the order of court by circuitous means.

As the Government states, "*The effect* [*of its action*] *was indeed to negate the transfer order*" (G. Br. 72).

The motivation was the Government's displeasure with an order entered in a forum originally chosen by it, transferring the case to a venue which the court had adjudicated to be fair to both sides.

The Government seeks to defend this extraordinary and unprecedented course of action in an 82-page brief. Before addressing ourselves to the specific arguments of this brief, we wish to point out the basic proposition which it maintains: That the Rules of Criminal Procedure and the orders of courts under them relating to the place of trial may *always* be defeated, in multiple venue situations, by the Attorney General's asserted absolute right to obtain multiple indictments, to elect the indictment and the forum in which he will prosecute, and to obtain dismissal under Rule 48(a).[2]

We submit that the Attorney General has no such absolute, unqualified right. Ordinarily, of course, he

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[2] In the trial court, the Government argued that the defendant had no standing under Rule 48 (a) to contest the Attorney General's motion to dismiss. (Memorandum Opinion, R. 28; Statements of Government Counsel, R. 24, 48). They seemed to be of the opinion that, except when during the trial", the trial judge's function under Rule 48 (a) is ministerial; that its purpose "was merely to give the Court control over the entries made in his docket. . . ." (R. 44).

Indeed, the Government's claim as to the absolute nature of its right to elect is so sweeping that they assert that this Court cannot give petitioner effective relief by reinstating the first indictment. The Government asserts that even in this event, the Attorney General would exercise his right to elect to proceed under the second indictment. (G. Br. 36-38).

has the right and duty to choose the forum for trial within applicable principles governing venue. And ordinarily, he has the right and duty to elect as between two jurisdictions in which to prosecute. But this right is *not* absolute. The Attorney General's choice in a multiple indictment situation will be set aside if the result of his election amounts to an abuse of power, or deprives the defendant of an important right, or results in "negating" an order of court or in circumventing the rules of procedure prescribed by this Court.

In making its extreme claim of power, the Government relies upon *Haas* v. *Henkel*, 216 U. S. 462 (G. Br. 38-39, *passim*). But *Haas* expressly recognizes that the Attorney General's power to elect the place of trial in a multiple indictment situation, is *not* absolute, but qualified. In the *Haas* case, this Court stated, that "*Primarily*", the election as to where the defendant shall be tried is the "right and duty of the Attorney General . . ." (216 U. S. at 474). But, the Court continued, "If unreasonable delay should result from continuances due to an election to try the same accusations in another district, a very different question might arise, calling for relief through habeas corpus." (216 U. S. at 474).[3]

Obviously, unreasonable delay is not the only circumstance that will defeat the Attorney General's election. The present case, we believe, provides another and a clear instance of the limitation of this right. The Attorney General cannot, however elaborately he may proceed, elect to prosecute for the same of-

[3] The reference to habeas corpus is due to the fact that the proceedings in *Haas* were upon removal of the defendant, and the issue was raised by application for habeas corpus.

fense under a second indictment in another district, obtained after transfer of the first indictment, where the deliberate purpose and the effect of his action are: (1) to nullify a court order, duly entered by a court having jurisdiction; (2) to repudiate a proceeding in a forum of its own, original selection because it did not like an order entered therein; (3) to reject trial in a forum expressly adjudicated to be favorable to neither side and to transfer prosecution to a second jurisdiction chosen after this adjudication; and (4) to circumvent and defeat the rules of criminal procedure, prescribed by this Court pursuant to statute, which vest the power to move for transfer solely in the defendant and deny that power to the Attorney General (Rule 21 (a)).

APPEALABILITY

The Government argues that the order of the Southern District dismissing the first indictment on motion of the Government, "does not appear to be appealable" (G. Br. 33), and that it cannot be reviewed by prerogative writ. Nevertheless, the Government states that "we would prefer to have a decision from this Court on the merits, so as to forestall the possibility of further delay" presumably resulting from an attempt to appeal after judgment on the second indictment (G. Br. 33).[4]

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[4] The Government refers this Court to a statement in *Holdsworth* v. *United States*, 179 F. 2d 933, 935 (1st Cir. 1950), which it apparently believes indicates the possibility of a ruling on the merits because of "the practical need for clarification". (G. Br. 47). We do not believe it necessary to join in this invitation to this Court because we believe that this Court's decisions furnish an adequate basis for the exercise of jurisdiction.

Aggrievement

The Government's first point is that petitioner is not aggrieved by the order under Rule 48 (a), dismissing the first indictment. It takes the position that to determine aggrievement, we may not look beyond the fact that the indictment was dismissed. According to the Government, the dismissal of the indictment must be viewed, for purposes of determining whether defendant was aggrieved, as terminating the prosecution.[5]

This position has no basis in reality or in law. Petitioner was certainly aggrieved by the dismissal order. The result of the dismissal was to "negate" (G. Br. 72) an order entered on defendant's motion fixing the place in which "the prosecution shall continue" (Rule 21 (c)), and to force defendant to trial in another district under another indictment for the same offense.

The difference between a *bona fide* dismissal terminating prosecution for the offense, and a dismissal for purposes of trial under another indictment for the same offense, is demonstrated by the very case upon which the Government relies: *Lewis* v. *United States*, 216 U. S. 611. In *Lewis* this Court refused to entertain an appeal from a *nolle prosequi*, but significantly, it expressly pointed out that no new indictment for the alleged offense had been returned, and the defendant could no longer be prosecuted because the statute of limitations had run.[6]

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[5] Under its next point, "finality", the Government says that the order of dismissal was not a "final decision" since it did *not* terminate the prosecution.

[6] *Cf. United States* v. *Shelley*, 218 F. 2d 157 (2d Cir. 1954), in which the court held an order of dismissal for lack of venue to be "final and appealable" but decided that appellant could not prosecute the appeal since he received the contested order of dismissal at his own request. . . ." (218 F. 2d at 158).

In the present case, the situation is the precise opposite of that presented in *Lewis*. Here, the second indictment was returned before the first was dismissed—indeed, before the motion for *nolle prosequi* was filed. It was made expressly clear that the motion to dismiss would not have been filed unless the second indictment had been obtained. The United States Attorney's authorization to file the motion for *nolle prosequi*, which was filed in support of the motion to dismiss, was expressly conditioned upon the return of the second indictment (R. 20).[7] He could not have *nolle prossed* the case except for the second indictment because of lack of authority to do so.

The purpose and effect of the dismissal were not to release defendant from prosecution, but to prosecute him in another forum, and to deprive him of his right, established after contest, to trial of the case in the transferee forum pursuant to Rules 21 (a) and (e). The Government argues that petitioner was not aggrieved because he had no right to trial in the forum to which the case had been transferred. This is simply another way of saying that Rules 21 (a) and (e) establish no procedural rights. In the circumstances of this case we submit that there can be no doubt as to petitioner's aggrievement.[8]

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[7] The teletyped authorization was as follows: "You are Authorized to Dismiss Indictment Pending in Southern District of Texas against George B. Parr for Violations of Section 145(b) Internal Revenue Code 1939 *if and when Indictment Returned in Western District.*" (Emphasis supplied) (R. 20)

[8] Dismissal of a case for reasons relating to venue has sufficiently "aggrieved" the Government that it has successfully prosecuted appeals from the dismissal orders. *In United States v. National City Lines, Inc.*, 334 U. S. 573, the Government appealed to this Court from an order entered, prior to the enactment of Section

Finality

The Government, however, professes to see a "second obstacle" to petitioner's standing to appeal. It urges that the order dismissing the first indictment is not "final" for purposes of the requirement of a "final decision" under 28 U. S. C. § 1291.[9] Relying on *Berman* v. *United States*, 302 U. S. 211, it asserts that appeal can be had in a criminal case only from "final judgment" and that final judgment means "sentence". (G. Br. 40 *et seq.*).

We respectfully submit that the Government's use of *Berman*, as well as its discussion of *Stack* v. *Boyle*, 342 U. S. 1; *Swift & Co.* v. *Compania del Caribe*, 339 U. S. 684; and *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, demonstrates the inadequacy of its analysis.

1. In *Berman*, this Court allowed appeal in a criminal case, on the ground that final judgment had been entered even though the sentence had been suspended. The Court addressed itself only to the meaning of "final judgment" in the context of appeal from a judgment in the facts. This satisfied the necessities of the case before the Court. The Court did not consider the requirements for appeal from other types of

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1404(a), dismissing the complaint on the grounds that it should in fairness be brought in another jurisdiction. It is interesting that the Government felt itself sufficiently aggrieved in that case that, instead of filing the action in the other jurisdiction, it appealed to this Court. See also *United States* v. *Wallace & Tiernan Co.*, 336 U. S. 798.

[9] Compare the Government's argument that the order of dismissal was so final that the defendant was not aggrieved by it.

orders, and did not define the broader term "final decision".[10]

2. In *Cobbledick* v. *United States*, 309 U. S. 323, this Court, holding that appeal does not lie from denial of motions to quash grand jury subpoenas, delineated the problem of "finality" in criminal appeals. It pointed out that the momentum of judicial administration would be arrested "by permitting separate reviews of the component elements in a unified cause." (309 U. S. at 325). But it pointed out that "finality is not a technical concept": "It is the means for achieving a healthy legal system." (309 U. S. at 326). "Due regard," said the Court, "for efficiency in litigation must not be carried so far as to deny all opportunity for the appeal contemplated by the statutes" (309 U. S. at 329).

3. Following *Cobbledick*, this Court has consistently declined appellate jurisdiction in cases where the order concerned is "one of the component elements in a unified cause". But it has also allowed appeals where "the decision . . . finally determine(s) claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546.

4. The quoted statement, in *Cohen*, following *Cobbledick*, was the basis of this Court's allowance of the appeal in *Swift & Co.* v. *Compania del Caribe*, 339

[10] *Cf.* The interpretation set forth in the concurring opinion of Jackson and Frankfurter, JJ., in *Stack* v. *Boyle*, 342 U. S. 1 at 12.

U. S. 684. In that case, this Court, after noting that a delay of appeal would destroy its practical value, stated that in these circumstances the provision requiring finality "should not be construed so as to deny effective review of a claim fairly severable from the context of a larger litigious process" (339 U. S. at 689).

5. Finally, *Cobbledick* and *Cohen* were reflected in *Stack* v. *Boyle*, 342 U. S. 1, in which this Court held that an order relating to bail, although it does not dispose of the merits of the criminal case, is a "final decision" which may be appealed. In the concurring opinion of Jackson and Frankfurter, JJ., the difference between a decision on a separable issue, such as bail, and one which would halt the orderly progress of the litigation was reiterated (342 U. S. at 9 et seq.).

We do not suggest that every separable decision determining a right under the Constitution, statute or rules is or should be appealable. We do not, for example, suggest that every decision granting or denying motions for transfer under Section 1404 (a) or Rule 21 (a) is or should be appealable. Even where the decision appealed from is severable, as this Court has noted, the importance of the decision and the effect of a denial of appeal are certainly factors to be considered (*cf.* the quotation from *Cohen* v. *Beneficial Industrial Loan Corp.*, *supra*, 337 U. S. at 546; *Swift & Co.* v. *Compania del Caribe*, *supra*, 339 U. S. at 689).[11]

[11] "That the dismissal was without prejudice to filing another suit does not make the cause unappealable, for denial of relief and dismissal of the case ended this suit so far as the District Court was concerned." *United States* v. *Wallace & Tiernan Co.*, 336 U. S. 793, 794 n. 1. "An order of dismissal for lack of venue, contrary to the assertion of the government, is final and appealable". *United States* v. *Shelley*, 218 F. 2d 157, 158 (2d Cir. 1955).

The present case, however, fits squarely within the lines established by this Court.

(1) It is an appeal from a final decision terminating the prosecution on the first indictment and ending the case so far as the District Court for the Southern District is concerned. The fact that the dismissal "leaves the merits undetermined and may not be a bar to another action does not make it interlocutory . . . This gives it the requisite finality for the purposes of a review." *Wilson* v. *Republic Iron & Steel Co.*, 257 U. S. 92 at 96.[12]

(2) In any event, the order of dismissal determines rights "fairly severable from the context of a larger litigious process." *Swift & Co.* v. *Compania del Caribe*, 339 U. S. 684, 689. The issue on this appeal is not petitioner's ultimate guilt or innocence. It is his right to the benefits of Rules 21 (a) and (c), and to trial on the offense charged in the forum to which the court transferred the first indictment following full hearing and a determination that the transferee forum is fair to both sides. This matter is preliminary to adjudication on the merits.

(3) The issue is of great importance. Essentially, it involves the proper administration of the rules prescribed by this Court and the question of the power of the Attorney General to "negate" an order of court and circumvent the rights acquired by a defendant pursuant to Rules 21 (a) and (c).

This Court has frequently noted that the proper administration of its rules of procedure is a matter

[12] To the same effect is *United States* v. *Wallace & Tiernan Co.*, 336 U. S. 793. See also our Main Brief, pp. 27-28.

peculiarly calling for its exercise of jurisdiction. Indeed, as we discuss hereinafter, this Court has even entertained direct application to it for prerogative writs in cases involving important questions under its rules, without prior application to the Courts of Appeals. *Los Angeles Brush Corp.* v. *James, D. J.*, 272 U. S. 701; *McCullough* v. *Cosgrave, D. J.*, 309 U. S. 634; see comment of Mr. Justice Frankfurter, dissenting, in *Ex Parte Republic Of Peru*, 318 U.S. 578, at 599; *cf.* Stone, C. J., in *Roche, D. J.* v. *Evaporated Milk Ass'n.*, 319 U. S. 21, at 31.

We respectfully submit that the invention and use by the Department of Justice of the present device to circumvent and *pro tanto* to nullify Rule 21 (a), with the acquiescence of a District Judge who, as we shall discuss, proceeded on a limited and erroneous conception of his duty and authority, require intervention and correction by this Court.[13]

The effect of the decision appealed from is, in dual venue cases, to reduce to an empty rite the privilege given to defendants by that rule to obtain transfer of criminal indictments where "so great a prejudice" exists that the defendant "cannot obtain a fair and impartial trial in that district or division"; and to establish for the Government the right to prosecute in a forum that it has chosen avowedly in order to "negate" a court order (G. Br. 72).

Moreover, unless this order is reviewed at this time, any possibility of effective review will be lost. The Gov-

[13] It should be noted that if the device used by the Department in this case is valid, it is available to the Government to defeat Rules 21 (a) and (c) and the rights of defendants and court orders thereunder in the vast number of cases where venue may be laid in more than one place. See, *e.g.*, 18 U.S.C. § 3237.

ernment professes to believe that the order will be reviewable on appeal from the final judgment after trial on the second indictment before Judge Rice in the Western District of Texas (Austin). At that time, however, the situation would indeed be anomalous: (1) We would not be asserting prejudicial error in the Austin trial, but would be complaining because of a decision in another forum: i.e., because petitioner had not been brought to trial in Laredo; (2) we could not reasonably assert that a different result would have been reached at trial in Laredo; (3) we would be appealing from a sentence after a jury verdict in the Western District before Judge Rice, on account of error in a decision which was made in the Southern District before Judge Kennerly and which Judge Rice could neither set aside nor modify. In these circumstances, we fear that the generous concession of the Government would be unavailing, and that our appeal would be met with the response that the error complained of is non-prejudicial and in any event, cannot be reached on appeal from judgment on the second indictment.[14]

PREROGATIVE WRITS

The Government's brief asserts that this is not an appropriate case for the issuance of prerogative writs. On the contrary, this case is typical of situations in which this Court has issued such writs in the absence of appeal or appealability, to compel or prohibit the exercise of jurisdiction and to enforce conformity with its rules.

The effect of the dismissal of the first indictment is (1) that the Southern District declines to exercise

[14] *Cf. Ford Motor Co. v. Ryan*, 182 F. 2d 329, 330 (CA 2, 1950); cert. den. 340 U. S. 841.

jurisdiction over the prosecution, and (2) that the Western District is proceeding to exercise jurisdiction with respect to the alleged offense, although the result of so doing is to effectuate the Attorney General's scheme to nullify the Southern District order and circumvent the rules prescribed by this Court.

This Court has on various occasions issued writs of mandamus and prohibition to compel inferior courts to exercise jurisdiction and to prohibit them from doing so. *United States* v. *Smith*, 331 U. S. 469; *Maryland* v. *Soper*, 270 U. S. 9; *McCullough* v. *Cosgrave*; *D.J.*, 309 U. S. 634; *Ex parte Republic of Peru*, 318 U. S. 578. In the latter two cases, as we have noted, this Court even entertained direct applications to it for the writs, without requiring prior recourse to the Court of Appeals.

The use of such writs is not confined, as the Government seeks to imply, to situations in which a court technically without jurisdiction seeks to exercise it, or in which a court refuses to exercise jurisdiction because of the erroneous view that it lacks jurisdiction (G. Br. 48-49). For example, in *McCullough*, *supra*, mandamus was issued to compel the District Judge to vacate an order referring the case to a Master, contrary to the equity rules. See also *Los Angeles Brush Mfg. Co.* v. *James, D. J.*, 272 U. S. 701 (similar situation) and *In re Simons*, 247 U. S. 231 (mandamus to require District Court to proceed with trial of a contract count at law).

Indeed, as we have stated, this Court has expressly recognized the peculiar appropriateness of the use of prerogative writs to require the courts to conform with the rules of procedure. In *Los Angeles Brush Mfg. Co.* v. *James, D. J.*, 272 U. S. 701, this Court stated:

> "... we think it clear that, where the subject concerns the enforcement of the equity rules which by law it is the duty of this court to formulate and put in force, and in a case in which this court has the ultimate discretion to review the case on its merits, it may use its power of mandamus and deal directly with the District Court in requiring it to conform to them." 272 U. S. at 706.

In *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21, the Court refused to permit use of the writ because "there are in this case no special circumstances which would justify the issuance of the writ, *such as the persistent disregard of the Rules of Civil Procedure* ... prescribed by this court, found in *McCullough* v. *Cosgrave*, 309 U. S. 634 ..." (319 U. S. at 31).

Accordingly, we submit that this Court, consistently with its precedents, may issue writs of mandamus and prohibition as requested by the petitioner in No. 202 Misc. Mandamus may be issued, in lieu of reversal on certiorari in No. 320, to compel the Judge of the Southern District to vacate the order dismissing the first indictment and to proceed with trial in Laredo pursuant to the order of transfer duly entered under Rule 21 (a). As also requested in No. 202 Misc., the Court may effectuate either its order of reversal on certiorari in No. 320 or its mandamus to the Judge of the Southern District, by mandamus or prohibition to the Judge of the Western District (Austin), to prevent him from proceeding with the second indictment.

We submit that this Court has ample power, as described, and may use that power consistently with its precedents, to assure that petitioner receives relief despite the Government's bold assertion that whatever might be the views of this Court, the Attorney General

could nevertheless effectuate his plan to "negate" the order of transfer. (G. Br. 72).

THE MERITS

The Government incorrectly states petitioner's position on the merits. We do *not* assert that the District Court lacks power *in any circumstances* to grant a motion to dismiss under Rule 48 (a) following a change of venue. (G. Br. 49-50). Obviously, for example, dismissal would be appropriate even after transfer under Rule 21 (a) if it were a *bona fide* abandonment of the prosecution as in *Lewis* v. *United States*, 216 U. S. 611. That, however, is not this case. Our position is as follows:

(1) We assert that the District Court is required by Rule 48 (a) to adjudicate the reasons, if any, given by the Government for its motion to dismiss, and to exercise real discretion in granting or denying dismissal. We submit that Judge Kennerly misconceived his role in this respect.

(2) We also assert that in this case the District Judge in any event wrongfully granted dismissal because the purpose and effect of the dismissal were to permit the Attorney General to "negate" a valid, subsisting order of the court; to nullify and circumvent Rules 21 (a) and (c) prescribed by this Court; and to effect a transfer of the case to a second jurisdiction which it had chosen for the sole purpose of defeating the court's order and depriving petitioner of the benefits thereof, although the rules deny to the prosecution power to apply for transfer.[15]

[15] Rule 21(c) provides that after transfer, "the prosecution shall continue" in the district or division to which the case is transferred. We believe that this rule means what its says, and that if prosecution for the offense is to continue, it must proceed in the transferee venue. See Main Brief, pp. 12-19.

We submit that the reason why this Court, despite a contrary recommendation of its Advisory Committee,[16] insisted that Rule 48 (a) require "leave of court" to dismiss an indictment, was to make certain that the District Courts actively supervise motions under the rule to prevent the Government from dismissing cases for improper reasons. We submit that among the reasons which are improper are the purpose of shopping around for a forum and harassing defendants by multiple indictments. We believe that it is the duty of the Government to make an initial choice of forum with care and fairness, and that, having made its choice, the Government cannot repudiate the chosen forum because it is displeased with the consequences. We do not believe that the Government may make "a test run in one jurisdiction"[17] and then start a proceeding in another jurisdiction because it is not pleased with an order entered in the first jurisdiction. We believe that the court's duty under Rule 48 (a) to supervise dismissal of an indictment was designed to prevent precisely this sort of trifling with court processes and the rights of defendants.[18]

It seems entirely clear that Judge Kennerly misconceived his function under Rule 48 (a). He ob-

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[16] Federal Rules of Criminal Procedure, Preliminary Draft (1943) 191.

[17] This is the phrase used by Cameron, J., dissenting below (R. 109).

[18] The language of *Hampton* v. *Williams*, 33 F. 2d 46, 49 (8th Cir. 1929) is applicable here:

> "Congress did not intend that a party could voluntarily proceed in the court where the suit was filed until he became dissatisfied and then transfer the case. It gave him the privilege to go ahead in one or the other court, as he desired, but he could not experiment with both."

viously did not feel that the Government was required to show reason for the dismissal. He felt that it should be granted, as he had always granted dismissals requested by the Government "in twenty-four years on the bench" (R. 79). He stated that he did not feel that the *defendant* had adduced facts to compel him to overcome this routine practice.[19]

The plain truth of the matter is that the Government had no proper reason for dismissal. The dismissal was sought in order to avoid trial in the transferee venue (Laredo) which the court had adjudicated to be fair to both parties. The Government's occasional suggestion that it had another reason for trial in the Western District (Austin): namely, that upon "reappraisal" *after* the transfer order was entered, it decided that proof of venue in the Western District would be easier than in the District where it obtained the first indictment—is patently improvised. (G. Br. 73-74). It undoubtedly considered with great care the relative merits of the two forums in all respects, before it broke with its practice of 20 years to bring this particular prosecution of this particular defendant in the Corpus Christi Division of the Southern District where rampant prejudice existed against him.

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[19] Circuit Judge Cameron, dissenting, summarized the situation as follows:

> "It is clear that the Court of the Southern District applied the wrong tests in deciding that the indictment first brought might be dismissed. If it had required the Government to establish a sound legal reason for the dismissal, giving due consideration to the rights of both parties, it is difficult to conclude that the right to dismiss would have been sustained, so barren is the record of any such showing. When all of the talk is boiled down, it points to the fact that the Government was wholly displeased with the prospect of a trial in a venue the court had adjudicated to be fair." (R. 110).

In the absence of good cause shown by the Government, the District Judge should have denied dismissal under Rule 48 (a). Certainly in this case, where the purpose and effect of the dismissal were improper, its denial was required. The Government did not seek dismissal because of legitimate reasons relating to the merits of the case. It sought dismissal in order (1) to evade the consequences of a valid transfer order, and (2) in effect to secure for itself the right to transfer the prosecution to a forum of its second choice. In short, it sought to use the device of dismissal under Rule 48 (a) to secure for itself the privilege of transfer denied to it by Rule 21 (a).

The Government had not the right even to apply for transfer from Laredo. It sought to arrogate the right not merely to apply for transfer but to accomplish it by the device of a second indictment in Austin and dismissal of the first indictment. We respectfully submit that this attempted manipulation of the rules is not permissible.[20]

The Government makes alternative suggestions which perhaps deserve brief comment: First, that

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[20] The Government seems to argue that *it actually does possess a right to seek transfer of a criminal case.* It argues as follows (Gov. Br. 54-55): (1) the Advisory Committee Notes state that the Government has no right to secure a transfer of the Criminal case. (2) The Advisory Committee refused the Government any transfer privileges because of the Constitutional venue rights of defendants to trial in the place where the crime was committed. (3) Since in this case the crime was committed in Austin as well as Corpus Christi the Advisory Committee's restriction does not apply and the Government does have a transfer privilege here.

We agree, as the Government seems to concede that it was here arrogating to itself a privilege of transfer. But we search in vain for any statutory or rule authority for it. The Rule grants it none in terms, and it cannot create such a privilege for itself by a devious and calculated misuse of the dismissal power provided in Rule 48.

Judge Kennerly's order under Rule 48 (a) may be viewed as "undoing what he had done in transferring the case to Laredo." (G. Br. 56). The short answer is that this was not the situation. Judge Kennerly ruled upon a motion for dismissal under Rule 48 (a), not for reconsideration of his order under Rule 21 (a). He was undoubtedly affected by his view that his authority under Rule 48 (a) was narrowly confined. It is the sheerest speculation to suggest how he would have decided a motion to reconsider his transfer order which was entered after elaborate argument and upon voluminous evidence which he "carefully studied". (R. 14). It is, however, significant that the Government instead of applying to him for reconsideration or seeking review in the appellate courts, took matters in its own hands by the procedure which it adopted.

Second, the Government argues that if there was error below, it consisted in Judge Kennerly's view that he could transfer the case only to the Laredo Division. Again, the short answer is that if this was error, it could have been attacked by the Government directly, by appropriate petition for reconsideration and by petition for mandamus to appellate courts to require the Judge to exercise his jurisdiction to choose the transferee forum from among all which the Government contends to be legally available. Certainly, the Judge's error in this respect, if it be error, does not give the Attorney General a right to nullify the transfer order and to circumvent Rules 21 (a) and (c) by the device of a second indictment and dismissal of the first indictment.

CONCLUSION

For the reasons stated, we respectfully submit that this Court grant petitioner's prayer for relief so that trial of the cause may proceed in the Laredo Division of the Southern District of Texas.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 320

GEORGE B. PARR, PETITIONER

v.

UNITED STATES OF AMERICA

GEORGE B. PARR, PETITIONER

v.

BEN H. RICE, DISTRICT JUDGE

No. 202 Misc.

GEORGE B. PARR, PETITIONER

v.

BEN H. RICE, DISTRICT JUDGE

GEORGE B. PARR, PETITIONER

v.

JAMES V. ALLRED, DISTRICT JUDGE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND ON MOTION FOR LEAVE TO FILE AND PETITION FOR WRITS OF MANDAMUS AND PROHIBITION

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the District Court for the Southern District of Texas transferring the case from Corpus Christi to Laredo (R. 16–35; Pet. App. 1–13), the oral opinion of that court granting the Government's motion to dismiss the indictment (R. 159–163; Pet. App. 13–15), and the opinions in the Court of Appeals (Pet. App. 16–36) have not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 13, 1955. (R. 272.) The petition for a writ of certiorari was filed on August 12, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1) and Section 1651.

QUESTIONS PRESENTED

1. Whether the order of the Federal District Court for the Southern District of Texas granting the Government leave to dismiss petitioner's indictment is appealable.

2. Whether there is cause for issuance of the writs of mandamus and prohibition, where, after the defendant's motion for change of venue has been granted, the United States Attorney obtains a second valid indictment in another district, and then dismisses the original indictment with leave of court after a full and fair statement of his reasons for so doing.

STATUTES AND RULES INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

18 U. S. C.:

SEC. 3237. OFFENSES BEGUN IN ONE DISTRICT AND COMPLETED IN ANOTHER

Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, or transportation in interstate or

foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.

Federal Rules of Criminal Procedure:

RULE 21. *Transfer from the District or Division for Trial.*

(a) *For Prejudice in the District or Division.* The court upon motion of the defendant shall transfer the proceeding as to him to another district or division if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division.

(b) *Offense Committed in Two or More Districts or Divisions.* The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged.

(c) *Proceedings on Transfer.* When a transfer is ordered, the clerk shall transmit to the clerk of the court to which the pro-

ceeding is transferred all papers in the proceeding or duplicates thereof and any bail taken, and the prosecution shall continue in that district or division.

RULE 48. *Dismissal.*

(a) *By Attorney for Government.* The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

* * * * *

STATEMENT

On November 15, 1954, an indictment was returned against petitioner in the Corpus Christi Division of the United States District Court for the Southern District of Texas charging him with wilful attempted evasion of his income taxes by means of affirmative acts committed in that district. (R. 4.) On April 27, 1955, Judge Kennerly ordered the case transferred to the Laredo Division of the Southern District because of prejudice existing in the Corpus Christi area. (R. 16–35.) In making application for this transfer, petitioner specifically refused to waive his constitutional privilege to be tried in the district wherein the crime was alleged to have been committed, and requested transfer only to Laredo. The Government objected to the requested transfer on the ground that it would be

severely handicapped by trial in Laredo (R. 33–35), but stated that it would have no objection to transfer to Houston, Galveston or Victoria. (R. 58.)

On May 3, 1955, a second indictment was returned in the Austin Division of the Western District of Texas, charging petitioner with wilful attempted tax evasion by filing false and fraudulent income tax returns at Austin, Texas. (R. 37.) The first and second indictments covered the same offenses; the allegations of specific acts committed in the carrying out of the offenses were different.

On May 4, 1955, the United States Attorney filed a motion to dismiss the original indictment in the Southern District under Rule 48 (a) of the Federal Rules of Criminal Procedure. (R. 35–36.) On May 16, 1955, Judge Kennerly, who had ordered the transfer to Laredo, heard argument on the motion to dismiss (R. 81–159) and dismissed the indictment (R. 159–166). The Government, in the course of presenting its argument to Judge Kennerly on the proposed dismissal, explicitly stated that one of the paramount factors underlying the new indictment in the Western District and the request for dismissal in the Southern District was the Government's apprehension that it would be handicapped by a trial in Laredo (R. 42–44, 48, 92–96, 114–116), the seat of petitioner's political power (R. 29–30, 34, 93; Pet. 6). In his oral opinion Judge Kennerly re-

ferred to his previous decision transferring the case from Corpus Christi to Laredo and said (Pet. App. 13–14):

> In reaching that conclusion, or rather in examining the record, I reached this further conclusion, that I gravely doubted whether in the administration of justice generally, the case should be tried in this district at all. I reached that conclusion, not as favoring either the Government or the defendant, but more from the standpoint of a judge who is charged with the administration of justice in the district.
>
> But when I came to examine the law, I found that I was without power to transfer the case outside of the Southern District of Texas. As you all know, we have in the state courts of Texas a practice by which the judge sometimes of his own motion sends a case here, there and elsewhere. There is no such provision in the federal statutes, and I found, as I understand the law, that I had no authority to transfer the case out of the Southern District of Texas. If I had had that authority I would have sent it to Amarillo, or Sherman, or Texarkana, or some of those places as far removed from the scene of the troubles as I could, or as I could find. I would have done that not, as I say, to favor either the defendant or the Government, because I feel that justice in the case would be best administered by transferring the case to one of those places.
>
> But as stated, I could not do that as I understand the law.

Petitioner appealed from the order of dismissal (R. 167), and also moved in the District Court for the Western District for a stay of all proceedings in that court pending the appeal, for dismissal of the second indictment, and for an order under Rule 21 (b) transferring the indictment back to Laredo or to Corpus Christi (R. 245–257). These motions were denied. Petitioner thereupon sought writs of prohibition and mandamus in the United States Court of Appeals for the Fifth Circuit to order the District Court for the Western District to vacate its order setting the second indictment for trial, to prohibit that court from exercising jurisdiction, and to stay all further proceedings there. (R. 253–255.)

The Government moved to dismiss the appeal (R. 184) and opposed the issuance of the writs (R. 258–270). The Court of Appeals, with Judge Cameron dissenting, dismissed the appeal and refused to grant the writs. (Pet. App. 16–36.)

ARGUMENT

1. The court below dismissed petitioner's appeal from the dismissal of the original indictment in the Southern District on the ground that the order complained of was interlocutory and non-appealable. (Pet. App. 17–21.) Petitioner does not attack this ruling with much conviction (Pet. 22–23); nor can he, for he is caught on the horns of a dilemma. If the order of dismissal be considered as the disposition of a separate case, without regard to the second indictment in the Western District, it constitutes the termination of

a case in which petitioner has not been aggrieved, and he cannot appeal. *Lewis* v. *United States,* 216 U. S. 611, 612. If, on the other hand, the dismissal be viewed in conjunction with the second indictment, then the order of the Southern District is clearly not a final order, but simply an intermediate step in the criminal proceeding, a proceeding which can only be made final for purposes of appeal by the conviction and sentencing of petitioner. *Berman* v. *United States,* 302 U. S. 211, 212–213; *Cobbledick* v. *United States,* 309 U. S. 323, 324–327; *Heike* v. *United States,* 217 U. S. 423, 429–430. It is clear, therefore, that the appeal from the order of the Southern District dismissing the indictment was properly dismissed by the court below.

2. In urging the issuance of the prerogative writs petitioner contends (Pet. 19–21) that Judge Kennerly failed to exercise the discretionary power over the dismissal of an indictment committed to the District Court under the provisions of Rule 48 (a) of the Federal Rules of Criminal Procedure (*supra,* p. 5), which permits a United States Attorney to dismiss an indictment prior to trial "by leave of court." But it is clear from the record that Judge Kennerly did exercise his discretion in granting the United States Attorney's request. Although the prosecutor argued that petitioner had no standing to object to the requested dismissal (R. 44), Judge Kennerly listened to extensive argument and even

permitted defense counsel to call the United States Attorney as a witness to state his reasons for the dismissal of the indictment (R. 86–159). Judge Kennerly was well aware of the problems which would confront the Government if trial were had at Laredo, for he had heard the Government's original objections on that score in connection with the motion for a change of venue from Corpus Christi to Laredo (R. 33–35). And the prosecutor frankly stated (*supra*, p. 6) that he desired the dismissal in the Southern District because of this difficulty in Laredo. After listening to long argument by both sides, Judge Kennerly stated that, at the time when he had transferred the case from Corpus Christi to Laredo, he had felt that it would be more in the interests of justice that the matter be tried in some other locality outside the Southern District, but that he had been powerless to transfer the case outside that district under the terms of petitioner's motion for a transfer to Laredo.[1] (*Supra*, pp. 6–7.) He then granted leave to dismiss the indictment. He was not giving mere passive approval, as petitioner asserts (Pet. 21), to the United States Attorney's request. He obviously approved it as the wisest course under the circumstances, and one which he would have adopted earlier himself had he considered himself free to do so. Petitioner's contention that he failed to exercise his discretion is without merit.

[1] As noted, *supra*, p. 5, petitioner requested transfer only to Laredo and no other place.

Furthermore, the issuance of the prerogative writs by this Court and by the Courts of Appeals is restricted to those cases in which the writ is necessary to protect appellate jurisdiction. *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 25. No such necessity exists here. Petitioner contends (Pet. 13–19) that the provisions of Rule 21 (c), *supra*, pp. 4–5, require that the trial be held only in Laredo.[2] But, as petitioner himself points out (Pet. 10, 24), this question has already been raised on the record in the Western District. Petitioner moved in that court that the prosecution under the second indictment be transferred from Austin in the Western District to either Corpus Christi or Laredo in the Southern District under Rule 21 (b), *supra*, p. 4, which would permit such transfer "in the interest of justice." If petitioner were actually entitled to trial in Laredo, the judge in the Western District would certainly have been required to grant the motion and transfer the case back to the Southern District. The issue is preserved, therefore, in the record of the pending proceeding in the Western District. Petitioner has his remedy by appeal and there is no necessity for issuance of the extraordinary writs. There is nothing to indicate that petitioner will be unfairly prejudiced by a

[2] On its merits, the contention is, in our view, clearly unsubstantial. Rule 21 (c) nowhere expresses or implies a limitation on Rule 48 so as to compel at all events continued prosecution of an indictment which the latter rule explicitly states "shall * * * terminate" upon the filing of a dismissal by the Attorney General or a United States Attorney by leave of the court.

trial in the Western District—indeed, Judge Kennerly found that it would be more fair to both parties that the case be tried elsewhere than in the Southern District—and the inconvenience of being required to undergo trial in advance of an appellate decision on the propriety of the pretrial proceedings clearly presents no basis for mandamus or prohibition. *Roche* v. *Evaporated Milk Assn., supra,* pp. 30–31; see also Rule 30 of the Revised Rules of this Court.

CONCLUSION

The court below was clearly correct in dismissing the appeal and no reason has been presented for issuance of the prerogative writs. The petitions for certiorari and for mandamus and prohibition should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 320

GEORGE B. PARR, PETITIONER

v.

UNITED STATES OF AMERICA

GEORGE B. PARR, PETITIONER

v.

BEN H. RICE, DISTRICT JUDGE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The memorandum opinion of the District Court for the Southern District of Texas transferring the case from Corpus Christi to Laredo (R. 8–19) is reported at 17 F. R. D. 512. The oral opinion of that court granting the Government's motion to dismiss the indictment (R. 78–80) has not been reported. The majority opinion of the Court of

Appeals and Judge Cameron's dissenting opinion (R. 92–111) are reported at 225 F. 2d 329.

JURISDICTION

The judgment of the Court of Appeals was entered July 13, 1955 (R. 92). The petition for a writ of certiorari was filed on August 12, 1955, and was granted on October 17, 1955 (R. 132). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Petitioner's application to this Court for leave to file a petition requesting the issuance of prerogative writs to Judges Rice and Allred of the Western and Southern Districts of Texas is pending, No. 202 Misc., October Term, 1955.

QUESTIONS PRESENTED

Following his indictment for income tax violations in the Corpus Christi Division of the Southern District of Texas, petitioner was granted a change of venue to the Laredo Division of this same district, so as to avoid possible prejudice arising from newspaper hostility in Corpus Christi. Petitioner was then indicted for offenses relating to the same tax returns in the Western District of Texas. The government, electing to proceed in the Western District, applied to the Southern District for leave to dismiss the first indictment. The same judge who had ordered the change of venue rejected petitioner's contention that the government was improperly circumventing the venue order and

granted the motion to dismiss, explaining that he "gravely doubted whether in the administration of justice generally, the case should be tried in [the Southern D]istrict at all" (R. 78).

On appeal from the order dismissing the indictment, the merits were not reached since the order was held to be not appealable. In granting certiorari, this Court directed that the case be heard both "on the merits and on the question of appealability" (R. 132). Thus the questions presented are:

1. Whether the order dismissing the indictment in the Southern District is appealable.

2. Whether, under the Federal Rules of Criminal Procedure, the District Court, by granting a motion for change of venue from one division to another division of the same district, was thereafter totally without power to permit the government to dismiss the indictment over petitioner's objection.

3. Whether the district judge misconceived his functions or acted so arbitrarily that his order dismissing the indictment constituted an abuse of discretion.

STATUTES AND RULES INVOLVED

A. PROVISIONS RELATING TO APPEALABILITY

As regards the threshold problem of appealability, the provisions invoked by petitioner are

28 U. S. C. 1291 and 1651 (a). In pertinent part, 28 U. S. C. 1291 provides:

> § 1291. FINAL DECISIONS OF DISTRICT COURTS.
>
> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * * except where a direct review may be had in the Supreme Court.

28 U. S. C. 1651 (a) provides:

> § 1651. WRITS.
>
> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

B. PROVISIONS RELATING TO THE MERITS OF THE ORDER DISMISSING THE INDICTMENT

1. Petitioner's indictment in the Southern District of Texas was dismissed under Rule 48 of the Federal Rules of Criminal Procedure, which provides:

> RULE 48. DISMISSAL
>
> (a) By Attorney for Government.
>
> The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

(b) By Court.

If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

2. Petitioner's motion for change of venue from the Corpus Christi Division of the Southern District of Texas to the Laredo Division of the same district was made and granted under Rule 21 of the Federal Rules of Criminal Procedure, which provides:

RULE 21. TRANSFER FROM THE DISTRICT OR DIVISION FOR TRIAL

(a) For Prejudice in the District or Division.

The court upon motion of the defendant shall transfer the proceeding as to him to another district or division if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division.

(b) Offense Committed in Two or More Districts or Divisions.

The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears

from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged.

(c) Proceedings on Transfer.

When a transfer is ordered the clerk shall transmit to the clerk of the court to which the proceeding is transferred all papers in the proceeding or duplicates thereof and any bail taken, and the prosecution shall continue in that district or division.

3. The venue statute, which permitted petitioner's indictment both in the Southern District of Texas, where his tax returns were prepared and forwarded for filing, and in the Western District of Texas, where they were filed, is 18 U. S. C. 3237. It provides:

§ 3237. Offenses begun in one district and completed in another.

Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

> Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.

STATEMENT

Petitioner, a prominent resident of Duval County in the Corpus Christi Division of the Southern District of Texas, has been twice indicted for willfully attempting to evade income taxes by preparing or filing false and fraudulent tax returns for the years 1949, 1950 and 1951, in violation of Section 145 (b) of the Internal Revenue Code of 1939, 53 Stat. 1, 62, 26 U. S. C. (1952 ed.) 145 (b). The two indictments were substantially similar except for the allegations relating to venue.

In November 1954, petitioner was first indicted in the Corpus Christi Division of the United States District Court for the Southern District of Texas, where it was alleged that he had prepared the fraudulent returns for each year (R. 1–3). On April 27, 1955, District Judge Kennerly granted petitioner's motion to transfer this Southern District case from the Corpus Christi Division to the Laredo Division of that district (R. 8, 13–19). Then on May 3, 1955, petitioner was indicted in the Austin Division of the United States District Court for the Western District

of Texas, where it was alleged that he had filed his tax returns (R. 111–113). On May 4, 1955, the government filed a motion in the Southern District, under Rule 48 (a) of the Federal Rules of Criminal Procedure (*supra*, p. 4), for leave to dismiss the first indictment (R. 19–27). On May 16, 1955, Judge Kennerly granted the motion to dismiss (R. 78–81).

On May 20, 1955, petitioner appealed from the order of dismissal (R. 81–82). On June 16, 1955, the government filed a motion in the Court of Appeals to dismiss the appeal, *inter alia*, on the ground that the order of dismissal was not appealable (R. 82–83). On July 1, 1955, petitioner sought permission from the Court of Appeals to file a petition for writs of mandamus and prohibition to prevent further proceedings in the Western District until petitioner's appeal from the Southern District's order of dismissal was finally determined (R. 83–90). The Court of Appeals, Judge Cameron dissenting, granted the motion to dismiss the appeal and denied leave to file the petition for writs of mandamus and prohibition, thus not reaching the merits of the challenged order[1] (R. 91–111).

The somewhat involved facts pertinent to the questions before this Court may be summarized as follows:

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[1] The order and judgment of the Court of Appeals were filed July 13, 1955 (R. 91–92). The majority and dissenting opinions were thereafter filed on July 22, 1955 (R. 92–111).

A. DISTRICT COURT PROCEEDINGS

The Southern District indictment was returned in the Corpus Christi Division on November 15, 1954 (R. 1): It contained three counts charging willfully attempted evasion of income taxes for the years 1949, 1950 and 1951 by means of affirmative acts committed in that divison (R. 1–3). The method of evasion charged was in preparing false and fraudulent income tax returns at San Diego, Texas,[2] and in depositing them in the office of the Collector of Internal Revenue in Corpus Christi for filing in the Collector's district office (which was located in Austin in the Western District) (*ibid.*). Following arraignment, petitioner entered a plea of not guilty (R. 3–5).

1. *The change of venue to Laredo:* In January 1955, petitioner moved, under Rule 21 (a) of the Federal Rules of Criminal Procedure (*supra*, p. 5), for a change of venue from the Corpus Christi Division of the Southern District, and specified that the change should be made to the Laredo Division of the same district (R. 117, 119–123). This motion was based upon a claim of undue prejudice against him in the Corpus Christi Division resulting primarily from unfavorable

[2] Petitioner's residence was in San Diego, which is located in the Corpus Christi Division, approximately 50 miles from that city.

publicity in three Corpus Christi newspapers (R. 120–122). This motion was supported by a number of newspaper clippings and various affidavits made by citizens residing within the division expressing the opinion that petitioner would not get a fair trial in Corpus Christi (R. 78).[4] The motion also contained a one-sentence general allegation that substantially similar prejudice existed in the Brownsville, Galveston, Houston, and Victoria Divisions of the Southern District (R. 122). In the brief which petitioner filed in support of this motion, his counsel stated (R. 17):

> We wish to be clearly understood that if the case is not to be transferred to Laredo we prefer that it remain in Corpus Christi.

In the government's reply to this motion, the United States Attorney (a) informed the court that the government "desires a fair trial", and that it did not oppose a transfer to secure such trial in the event of a finding that petitioner would be prejudiced by the newspaper publicity

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[3] Petitioner also claimed that prejudice had resulted from certain investigations which had preceded his indictment (R. 122).

[4] In the Appendix (*infra*, pp. 77–82) we have set forth, as illustrative of the affidavits filed both by petitioner and by the government, two affidavits given by Hayden W. Head, a leading member of the Corpus Christi Bar. In the first of these affidavits (*infra*, pp. 77–81), he expressed the view that petitioner could not get a fair trial in Corpus Christi; in the second (*infra*, pp. 81–82), he stated that he was equally of the opinion that trial in Laredo would not be fair to the government.

(R. 124); (b) questioned petitioner's claim that a fair trial could not be had in Corpus Christi (R. 124–126); and (c) strongly challenged petitioner's right to specify Laredo as the only place to which transfer could be made on a finding of prejudice in Corpus Christi (R. 123–131). He pointed out that petitioner's insistence upon trial in Laredo was particularly incongruous, since the circulation of the newspapers constituting the principal alleged source of unfavorable publicity was relatively very much greater in the Laredo Division than in either the Houston or Galveston Divisions of the Southern District (R. 124–125, 127–131).[5] He urged that, if petitioner's real purpose was to avoid the alleged prejudicial influence of these newspapers, the transfer should be to a place outside the Southern District or to a division in the district, such as Houston or Galveston, where the circulation of the newspapers in question was negligible (R. 124–126; cf. R. 55).

The government also submitted numerous supporting affidavits from residents of the Southern District, both from the Corpus Christi and Laredo divisions.[6] With one or two exceptions the Corpus

[5] The circulation of the papers named by petitioner was shown to be respectively twenty and fifty times greater in the Laredo Division than in the Galveston and Houston Divisions (R. 124–125, 127–131).

[6] We are filing with this Court photostatic copies, certified by the clerk of the District Court for the Southern District, of the government's supporting affidavits.

Christi affiants stated that they had not been prejudiced by the newspaper publicity and that they believed that petitioner could and would get a fair trial in that city. The Laredo affiants and many of those from Corpus Christi expressed a strong belief that the government could not get a fair trial in the Laredo Division because of the nearly absolute political control exercised in the Laredo area by petitioner and by those allied with him (see *e. g.* App., *infra*, at pp. 81–82).[7]

On April 27, 1955, Judge Kennerly granted petitioner's motion and directed that the case be transferred to the Laredo Division, filing a memorandum opinion in which Judge Allred concurred (R. 8, 13–19). On May 16, 1955, the order of transfer was signed (R. 29–30). The court found that petitioner and his close associates had received much unfavorable publicity in the named Corpus Christi newspapers relating to political matters, elections, law enforcement, taxation, the killing at night of a young man at Alice, Texas, impeachment proceedings affecting certain judicial and other officers of Duval County, and various other matters (R. 14–16). On the basis of this publicity, the court held that petitioner had established his claim of prejudice so that the

[7] Substantially the entire Laredo Division lies within the same Texas State Senatorial District in which petitioner is the recognized political leader. 28 U. S. C. 124; Vernon's Tex. Anno. Stat. (1955 Supp.) Art. 193; and see especially V. O. Key, Jr., *Southern Politics in State and Nation* (Alfred N. Knopf, 1950), pp. 273–275. Cf. R. 131.

trial should not be held in Corpus Christi (*ibid.*). Judge Kennerly further decided that he totally lacked power to transfer the case anywhere other than to Laredo, since petitioner was insisting upon transfer to Laredo and would not consent to transfer elsewhere (R. 16–18). His opinion stated (R. 17):

> It is, therefore, under the law not within the power of the Court to transfer the case to either the Houston, Galveston, Victoria or Brownsville Division, but only to the Laredo Division.

The judge also noted his conclusion that the government would not "be under a severe handicap" if the case were transferred to Laredo (R. 18–19).[8]

2. *The Western District indictment:* On May 3, 1955, petitioner was indicted in the Austin Division of the Western District of Texas (R. 111). The offenses charged in this second indictment were willfully attempting to evade income taxes for the years 1949, 1950 and 1951 by filing false and fraudulent returns with the District

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[8] This conclusion must be read with Judge Kennerly's subsequent opinion announced May 16, 1955, when he granted the government's motion to dismiss the transferred indictment (R. 78–80). In this May 16 opinion he stated that while he had concluded that the case should not be tried in Corpus Christi, he "gravely doubted whether in the administration of justice generally, the case should be tried in this [Southern D]istrict at all" (R. 78). (See *infra*, pp. 17–18.)

Collector of Internal Revenue in Austin (R. 111–113).

Both the original Corpus Christi indictment in the Southern District and the subsequently returned Austin indictment in the Western District thus covered substantially the same offenses, willful evasion of income taxes for the three years in question (R. 1–3, 111–113). Only the facts alleged in order to establish venue differed. The Southern District indictment charged the preparation of the false income tax returns in San Diego, Texas, and the depositing of the returns in the Collector's office in Corpus Christi (R. 1–3). The Western District indictment charged filing the false returns in the Collector's office in Austin (R. 111–113).

3. *The dismissal of the Southern District indictment:* On May 4, 1955, the United States Attorney filed a motion in the Southern District, pursuant to Federal Rule 48 (a) (*supra*, p. 4), for "leave of court" to dismiss the indictment in that district (R. 19–22). This motion was in the form of a *nolle prosequi* (*ibid.*). It directed the court's attention to the return of the Western District indictment against petitioner and was accompanied by a written state-

ment of reasons for the requested dismissal[9] (R. 22–27). Judge Allred referred this motion for leave to dismiss to Judge Kennerly, who had heard and granted petitioner's motion for change of venue (R. 27–29). On May 16, 1955, the motion to dismiss came on for hearing, and Judge Kennerly overruled the government's contention that petitioner had no standing to object to the entry of the dismissal order, stating (R. 48–49):

> I repeat, counsel, that the wording of the rule contemplates that there is some—I don't know how much—discretion with the Judge of the Court. In exercising that discretion, I think I ought to have the facts. If the defendant in the case has any facts he wants to present to me, whether from the District Attorney or otherwise, in the exercise of that discretion, if I have that discretion, I think I should hear it * * *.

The court thereupon allowed petitioner to present evidence in opposition to the requested dismissal and to call the United States Attorney as a witness (R. 48–59).

At the hearing, the United States Attorney informed Judge Kennerly that the initiation of

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[9] The motion was also accompanied by a copy of a telegram from Assistant Attorney General H. Brian Holland authorizing the dismissal of the Southern District indictment "if and when" petitioner was indicted in the Western District (R. 20).

the prosecution in the Western District had been undertaken to accomplish what the court had construed as being beyond its power to do (R. 23–24). He explicitly stated that the return of the new indictment in the Western District and the request for dismissal in the Southern District was based in substantial part on an apprehension that the prosecution would be handicapped by a trial in Laredo (R. 23–24, 26, 40–42, 53–55), the seat of petitioner's political power (R. 41; cf. R. 15–16, 18).[10] He pointed out that, in order to prove the government's case, testimony would have to be elicited from residents of Laredo, and from long-time acquaintances and friends of petitioner who would be reluctant or hostile witnesses, and that these witnesses would be in a position to testify more freely, honestly, frankly and truthfully the further removed they were from the border district in which Laredo was located and which was in the area of petitioner's political influence (R. 22–27, 41–42, 53–54).

It was also brought to the court's attention that the establishment of venue and proof of the offenses would be somewhat simpler under the second indictment, and that this factor of simplification of venue proof had in the past led to prosecutions for income tax evasion being customarily brought in the Austin Division, where the returns from the South Texas area were filed,

[10] See footnote 7, *supra*, p. 12.

rather than in the district and division of the taxpayer's domicile (R. 38). However, it was explained that prosecution in the instant case had been initially referred to the Southern District in view of impending personnel changes in the Western District, involving the then incumbent United States Attorney for that district and a substantial portion of his staff (R. 39–40).[11]

Petitioner conceded that there was no legal inhibition against his being indicted for the same offenses in two districts of coordinate jurisdiction (R. 63) and that dismissal with court approval was within the power of the Attorney General and the United States Attorney (R. 32–33, 77). Nevertheless, he vigorously urged on Judge Kennerly that the government's purpose was to circumvent the judge's order of transfer and that, in the exercise of his discretion, the requested dismissal should not be allowed (R. 30–34, 60–77).

After hearing testimony and argument (R. 34–77), Judge Kennerly granted the government's motion and directed that the indictment be dismissed, rendering an oral opinion at the close of the hearing (R. 78–81). In this opinion he referred to his previous decision transferring the

[11] The incumbent United States Attorney did not leave office in the Western District until approximately two months after the Southern District grand jury had returned the first indictment against petitioner.

case from Corpus Christi to Laredo, and stated (R. 78-79):

> In * * * examining the record, I reached this further conclusion, that *I gravely doubted whether in the administration of justice generally, the case should be tried in this district at all.* I reached that conclusion, not as favoring either the Government or the defendant, but more from the standpoint of a judge who is charged with the administration of justice in the district.
>
> But when I came to examine the law, I found that I was without power to transfer the case outside of the Southern District of Texas. * * * If I had had that authority I would have sent it to Amarillo, or Sherman, or Texarkana, or some of those places as far removed from the scene of the troubles as I could, or as I could find. I would have done that not, as I say, to favor either the defendant or the Government, because I feel that justice in the case would be best administered by transferring the case to one of those places.
>
> But as stated, I could not do that as I understand the law. I then discovered that I could not transfer the case to any other division of the district except Laredo. * * * [Emphasis added.]

He further noted that, under Rule 48 (a) (*supra*, p. 4), he evidently had "some discretion * * * as to the matter of whether the case should or should not be dismissed," and that (R. 79):

> In twenty-four years on the bench in this district, I do not recall ever having at any time hesitated to dismiss a case when requested by the Government. That was of course under the old law, and under the present rules. If I have a discretion under the rules now as to whether this case should or should not be dismissed, I must exercise that discretion and allow it to be dismissed, because I do not think that the defendant, either in the hearing this morning or in this enormous record on the question of change of venue,[12] has shown any reasons why the case should not be dismissed.

4. *Subsequent proceedings in the Western District:* On May 25, 1955, petitioner moved in the Western District to stay all proceedings in that district pending the determination of the appeal which he had filed from the Southern District's order dismissing the transferred indictment (R. 113–115). Petitioner also moved in the Western District (a) to dismiss the indictment in that district based on an alleged lack of jurisdiction resulting from Judge Kennerly's change of venue order and (b) for transfer of the Western District indictment to Laredo or to Corpus Christi [*sic*] (R. 87–88). These motions were all denied (R. 87–88). Subsequently,

[12] As Judge Kennerly here noted, his order of dismissal was based not only on the hearing on the notice to dismiss, but also on the record on the change of venue motion.

the government asked for and was granted a continuance of the trial on the indictment in the Western District pending decision in this Court on certiorari.

B. APPELLATE PROCEEDINGS

On May 20, 1955, petitioner filed a notice of appeal from the Southern District's order of dismissal (R. 81–82). On June 16, 1955, the government filed a motion to dismiss petitioner's appeal, on the grounds that (a) the order of dismissal was not a "final decision" within the meaning of 28 U. S. C. 1291; (b) reinstatement of the prosecution in the Southern District would be futile since the government could elect to prosecute the indictment in the Western District to a final decision irrespective of the pendency of a similar indictment in the Southern District; and (c) the appeal was frivolous as obviously without merit and taken for the purpose of delay (R. 82–83).

On July 1, 1955, after his motions in the Western District for a stay, dismissal, or transfer, had been denied (R. 87–88), petitioner sought leave of the Court of Appeals to file a petition for writs of prohibition and mandamus to be issued to the District Court for the Western District to prevent that court from proceeding further pending the final determination of the appeal from the Southern District's order dismission the transferred indictment (R. 83–90).

By a divided vote, the Court of Appeals dismissed the appeal and denied petitioner leave to file his petition for the prerogative writs (R. 91–111). In an opinion by Chief Judge Hutcheson, the court held that the order appealed from was not a final order for purposes of appeal, since it did not terminate the matter in controversy, *i. e.*, petitioner's guilt or innocence of the crime of tax evasion (R. 92–97).

Judge Cameron dissented (R. 97–111), on the grounds that the appealability of the order of dismissal presented a question sufficiently serious to justify hearing and argument, and that the status quo should be maintained by mandamus and prohibition until a hearing on the merits. He also indicated his view that, even if the order were not appealable, the Court of Appeals could grant mandamus and prohibition ordering the Southern District to vacate the order of dismissal and proceed with the trial, if the facts justified such action (R. 103), even though petitioner had not asked the Court of Appeals to issue these writs to compel action from the Southern District. Judge Cameron further stated that he thought that the facts justified granting relief (R. 103), and indicated his belief that Judge Kennerly had applied the wrong test in granting the gov-

ernment leave to dismiss the Southern District indictment (R. 110–111).[13]

In this Court petitioner sought a writ of certiorari to review both the dismissal of his appeal and the refusal to grant him leave to file his petition for the prerogative writs seeking to preserve the status quo in the Western District.[14] In addition, he also presented a motion for leave to file a petition for writs of mandamus and prohibition (No. 202, Misc., Oct. Term, 1955), to be issued (a) to Judge Allred in the Southern District directing the reversal of Judge Kennerly's order of dismissal of the first indictment, and (b) to Judge Rice in the Western District directing transfer of the second indictment to Laredo. Petitioner's motion to this Court for leave to file his petition for these prerogative writs is still pending.

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[13] Judge Cameron's views on the merits were made without the benefit of a presentation from the government on these matters. The court's decision dismissing the appeal was handed down before the due date of the government's brief on the merits, which was therefore never filed.

[14] Since the court in the Western District entered an order, on application of the government, granting a continuance of the case in that district pending this Court's decision on certiorari, the propriety of that part of the Court of Appeals' judgment relating to the prerogative writs has been rendered moot.

SUMMARY OF ARGUMENT

I

The order granting the government "leave of court" to dismiss the first of two similar indictments pending against petitioner does not appear to be appealable, since (a) petitioner has not been aggrieved; (b) no final appealable order has been entered relating to the matters in controversy; and (c) none of the exceptions to the final order rule appear to be applicable. Nor is this order subject to review by prerogative writ.

A. In order to have any standing to appeal, a party must have been aggrieved by the judgment which he seeks to have reviewed. Petitioner has not been aggrieved by the dismissal of an indictment returned against him. *Lewis* v. *United States,* 216 U. S. 611. His claim of aggrievement seems to rest upon a contention that the prior decision transferring the first indictment from Corpus Christi in the Southern District to Laredo in the same district gave him a vested right to be tried in Laredo, even though a valid indictment had been subsequently returned in the Western District involving substantially the same offense. However, it is wholly immaterial, as regards the matter of aggrievement, whether or not the order of dismissal constitutes a bar to a subsequent prosecution for the same offense. Cf. *Heike* v. *United States,* 217 U. S. 423.

Petitioner's lack of aggrievement is well illustrated by analyzing his position in the event that

the Southern District indictment were reinstated against him, as he claims is his right. In that event, there would be two indictments pending against him, and the Attorney General, acting within his well-recognized powers, would have both the right and duty to elect under which of the two he would proceed. A court will not make the choice for the Attorney General as to which of two indictments he must prosecute, if jurisdiction lies in more than one court. *Haas* v. *Henkel*, 216 U. S. 462.

B. A second obstacle to petitioner's standing to appeal is presented by the absence of an appealable final order. "In criminal cases, as well as civil, the judgment is final for the purpose of appeal 'when it terminates the litigation * * * on the merits' and 'leaves nothing to be done but to enforce by execution what has been determined.'" *Berman* v. *United States*, 302 U. S. 211, 212–213. Strict adherence to this rule of finality is essential in criminal cases to avoid encouraging the kind of delay which is fatal to the proper administration of justice. See *Cobbledick* v. *United States*, 309 U. S. 323, 324–327.

Petitioner finds himself upon the horns of a dilemma as regards his claims of finality and aggrievement: His claim of finality rests upon an attempt to treat the order of dismissal as one finally terminating his prosecution in the Southern District. His claim of aggrievement seems to rest upon the pendency of the Western District

indictment. If the dismissal is to be viewed in conjunction with the second indictment for purposes of aggrievement, then the order of dismissal is not final for purposes of appeal, but simply an interlocutory step in the criminal proceedings against petitioner.

C. None of the exceptions to the final order rule developed in such cases as *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, appears to be applicable to the instant case. Petitioner has already incorporated the proceedings in the Southern District into the record of the proceedings in the Western District. He has moved in the latter district to dismiss that indictment or to transfer it to the former, on the ground that he had a vested right to be tried where he was first indicted. Appellate review as to the correctness of the overruling of these motions must await an appeal from a final conviction in the Western District prosecution. If petitioner's contention that he has in fact a vested right to be tried in Laredo by virtue of the transfer order should by any chance be a valid one, it would follow that his trial in the Western District would be improper, thus entitling him to a reversal in the event of a conviction. When reduced to its essence, petitioner's contention amounts to no more than that he will be put to the inconvenience and expense of a trial before he can be heard on his contention of error. This possibility does not warrant departure from the

rule of finality. *Heike* v. *United States*, 217 U. S. 423.

The only possibility of which we are aware which might permit an exception to the rule of finality, is that suggested in *Holdsworth* v. *United States*, 179 F. 2d 933, 935 (C. A. 1), where "the practical need for clarification overcomes the reluctance to issue what may be termed obiter dictum". However, this exception has never been recognized by this Court.

If the issues relating to the merits are reviewable under some exception to the final judgment rule, there is no need to consider the application for the issuance of the prerogative writs of mandamus and prohibition sought by petitioner in No. 202 Misc. On the other hand, if the order of dismissal is not appealable, there is no occasion for this Court to grant such extraordinary relief, which will only be granted when necessary to protect appellate jurisdiction. The request made to the court below for writs of mandamus and prohibition, to stay proceedings in the Western District pending appeal, has been rendered moot, since the District Court has itself stayed the prosecution until informed of this Court's disposition of the case at bar.

II

Petitioner's basic contention on the merits is that a federal district court, in which an indictment is pending following a change in venue, is

totally without power, under the Federal Rules of Criminal Procedure, to grant leave to the government to dismiss the indictment, over the indicted defendant's objection, irrespective of the circumstances and the extent to which the interests of justice would be best served by permitting the dismissal. This novel contention is utterly without merit and is in no way supported by the history, text or context of the applicable rules. Rule 48 (a) (*supra*, p. 4), authorizing the dismissal of an indictment by "leave of court", expressly limits the power to grant such leave only in cases where the trial has actually begun. No other exception or limitation can be read into this rule. The fact of transfer has no bearing on the court's power to dismiss in a proper case.

In contending that the Attorney General can no longer make a choice of the place of prosecution on two indictments pending in different districts, once there has been a change of venue ordered as to one of the indictments, petitioner relies on the failure of the rules to provide any right in the prosecution to move for a change of venue. Petitioner's argument totally overlooks the Advisory Committee's explanation that the absence of such a right in the prosecution rests on the constitutional right of a defendant to trial where the offense was committed. Since the offense of tax evasion alleged in the Western Dis-

trict indictment was committed in that district, there is no possible question of transgressing on any of petitioner's constitutional rights. Rule 21 (*supra*, pp. 5–6) left the matter of the place of trial for a crime committed in two districts to the sound discretion of the court.

Petitioner also overlooks the rule that interlocutory orders are not *res judicata* and that it was within Judge Kennerly's power both to vacate his order of transfer to Laredo and to dismiss the indictment, his jurisdiction being coextensive with the judicial district in which both the Corpus Christi and Laredo Divisions were located.

III

The order dismissing the indictment in the Southern District constituted a proper exercise of discretion on the part of District Judge Kennerly.

A. Petitioner's contention that Judge Kennerly did not understand that he had any discretion in the matter or that he misconceived his functions is completely rebutted by his statements in his opinion (R. 79), by his remarks made during the course of the full hearing given to petitioner (R. 48–49), and by his careful explanation of why he was granting leave to dismiss the indictment (R. 78–79). Judge Kennerly's significant comments, which directly refute petitioner's contention that the judge "clearly assumed that

he had no discretion to deny the Government's motion to dismiss" (Pet. Br. 21), include such remarks as "[u]nder the rule * * * evidently there is some discretion in the Court as to the matter of whether the case should or should not be dismissed" (R. 79). He also stated (*ibid.*):

> If I have a discretion under the rules now as to whether this case should or should not be dismissed, I must exercise that discretion and allow it to be dismissed, because I do not think that the defendant, either in the hearing this morning or in this enormous record on the question of change of venue, has shown any reasons why the case should not be dismissed.

Manifestly the court was exercising a real discretion in authorizing the dismissal.

B. Judge Kennerly expressly concluded that the interests of justice would be best served by having the case heard outside of the Western District (R. 78), thus squarely rebutting petitioner's claim that, if the judge had exercised any discretion at all, his order of dismissal was so arbitrary as to constitute an abuse of discretion.

No "unfair advantage" was sought by the government in bringing the first indictment in the Corpus Christi Division of the Southern District. This was petitioner's home district and indictment there comported with current policies of income tax law enforcement involving, in appropriate

cases, indictment in taxpayer's vicinage rather than in the judicial district in which his returns were filed. Furthermore, at the time the matter was presented to the Southern District grand jury, a serious personnel situation existed in the Western District, involving the expected departure of the then incumbent United States Attorney and a very substantial portion of his staff.

Petitioner's display of indignation is belied by his own preference of Corpus Christi over any place-of-trial other than Laredo, a seat of petitioner's political influence. When the government did not oppose a transfer to secure a fair trial, petitioner's counsel told the court (R. 17):

> We wish to be clearly understood that if the case is not to be transferred to Laredo we prefer that it remain in Corpus Christi.

If petitioner's real purpose had been to avoid the alleged baleful influence of the Corpus Christi newspapers which was advanced as the principal ground for a change of venue, he should have sought transfer not to Laredo, but to the Houston or Galveston Divisions of the Southern District, in which their circulation and influence was tremendously smaller, or to a place outside the district. While Judge Kennerly concluded that the government would not "be under a severe handicap" by trial at Laredo (R. 18–19), this conclusion must be read with the same judge's statements that he "gravely doubted whether in the administration of justice generally, the case

should be tried in [the Southern D]istrict at all" and that the case should have been sent as far from the scene of the trouble as could be found (R. 78).

If there be error in the record, it is in Judge Kennerly's view that under Rule 21 (a) (*supra*, p. 5) petitioner could choose the district of transfer, and in failing to recognize that, when petitioner made his motion for change of venue, he necessarily waived his constitutional privilege to have his trial in the district and division of the offense. Thus initially, the transfer should have been to where the court found that the proper administration of justice and fairness to both petitioner and to the government required the case to be sent.

There is no merit to the further contention that the return of the indictment against petitioner by the grand jury for the Western District, which had jurisdiction of the offense, and the government's dismissal of the earlier indictment in the Southern District after securing "leave of court" to do so, together constituted a misuse of the power to terminate. The government fully informed Judge Kennerly of the reasons why the sequence of events made necessary and desirable its request for leave to dismiss the Southern District indictment. Under Rule 48 (a) (*supra*, p. 4), the government's reasons for wanting dismissal were subject to review by the district court in which the indictment to be dismissed was pending.

The government requested the dismissal for proper reasons, and the District Court exercised a sound discretion in the matter, which should be left undisturbed.

ARGUMENT

Petitioner's basic contention on the merits is a wholly novel one. He argues that a federal district court, in which an indictment is pending following a change of venue, is totally without power, under the Federal Rules of Criminal Procedure, to grant leave to the government to dismiss the indictment, over the indicted defendant's objection, irrespective of the circumstances and of the extent to which the interests of justice would be best served by permitting the dismissal (Pet. Br. 12–19). This contention is utterly without merit. No decision of any court has so held, or even suggested that this might have been the object of the rules, and the contention finds no support in their language, purposes, or history (see *infra*, pp. 50–57). Petitioner further contends that in this particular case the district judge who granted the motion to dismiss misunderstood the scope of his discretionary power under Rule 48 (a) (*supra*, p. 4) (Pet. Br. 19–23). Petitioner also implies throughout his brief that the court acted so arbitrarily in dismissing the indictment that the order of dismissal constituted an abuse of discretion (Pet. Br. 12–23). These

additional contentions are equally erroneous and unsubstantial (see *infra*, pp. 57–75).

However, before reaching the merits of the order dismissing the transferred indictment, it is necessary to determine whether this order is appealable. At this stage of the litigation we would prefer to have a decision from this Court on the merits, so as to forestall the possibility of further delay. However, we consider ourselves obligated to raise and brief this threshold question of appealability, in view of (a) the holding below that the order was not appealable; (b) this Court's directive, in its order allowing certiorari (R. 132), that the case would be heard on the question of appealability as well as on the merits; and (c) the complete absence of any decision or authority permitting a defendant to appeal either from a *nolle prosequi* or from any other dismissal of an indictment returned against him.

I

THE ORDER GRANTING THE GOVERNMENT'S MOTION TO DISMISS THE INDICTMENT DOES NOT APPEAR TO BE APPEALABLE

A. *Petitioner has not been aggrieved by the dismissal of the indictment against him*

It is a fundamental requisite of appealability in both criminal and civil cases that the party taking the appeal must be aggrieved by the judgment which he seeks to have reviewed. *Lewis* v. *United States*, 216 U. S. 611; *Farmers' Loan*

and Trust Co. v. *Waterman*, 106 U. S. 265; *United States* v. *Adamant Co.*, 197 F. 2d 1, 5 (C. A. 9), certiorari denied *sub nom. Bullen* v. *Scoville*, 344 U. S. 903; *Schaaf* v. *State*, 221 Ind. 563, 49 N. E. 2d 539. An order dismissing an indictment cannot aggrieve the defendant, since it terminates all further prosecution under the dismissed indictment. *Lewis* v. *United States*, *supra*;[13] *Schaaf* v. *State*, *supra*. In that posture of a case, there is no longer any justiciable controversy before the court. Cf. *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 240–241; *Cover* v. *Schwartz*, 133 F. 2d 541, 546 (C. A. 2), certiorari denied, 319 U. S. 748.

Petitioner's claim of aggrievement seems to rest upon his contention that the prior transfer from Corpus Christi in the Southern

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[13] Petitioner attempts to discount the impact of the unanimous holding in *Lewis*, by suggesting that the statement of an alternative ground for decision, *i. e.*, mootness caused by the running of the statute of limitations, was intended to limit the Court's express holding that no aggrievement results from a dismissal on *nolle prosequi* (Pet. Br. 26). Petitioner's argument is directly rebutted by this Court's unanimous decision at the same term in *Heike* v. *United States*, 217 U. S. 423, denying an interlocutory appeal to establish a claim of immunity prior to the entry of a final judgment of conviction. See also *Ex parte Altman*, 34 F. Supp. 106, 108–109 (S. D. Cal.), in which Judge Yankwich stated: "But the order of dismissal was neither a judgment nor was it final. A dismissal or nolle prosequi does not work an acquittal. * * * Nor is it an appealable order."

District to Laredo in the same district gave him a vested right to be tried in Laredo, even though a valid indictment had been subsequently returned in the Western District involving substantially the same offense.[16] However, it is wholly immaterial, as regards the matter of aggrievement necessary to give a defendant standing to prosecute an appeal, whether a second prosecution is pending or threatened, or whether the order of dismissal may be used as a defense to a subsequent prosecution.

Neither at the common law, nor in the federal courts prior to the adoption of the Federal Rules of Criminal Procedure, did a *nolle prosequi* work an acquittal or bar a second prosecution for the same offense or constitute jeopardy, provided the dismissal was made prior to the commencement of trial. *Dealy* v. *United States*, 152 U. S. 539, 542; *Wolff* v. *United States*, 299 Fed. 90 (C. C. A. 1); and cases cited in *Ex parte Altman*, 34 F. Supp. 106, 108–109 (S. D. Cal.). However, once the trial had begun and a jury impaneled, a dismissal without the consent of the defendant operated as an acquittal and barred further prosecution. See *Commonwealth* v. *Hart*, 149 Mass. 7, 8, 20 N. E. 310; and authorities cited in Orfield, *Criminal Procedure From Arrest to*

[16] As in shown *infra* at pp. 50–57, this claim is wholly without merit.

Appeal (N. Y. Univ. Press, 1947), pp. 338–340." In this latter event, the dismissal would have the same effect as a plea of former acquittal, giving rise to no right to appellate review unless and until a final judgment was entered against the defendant in a further prosecution involving the same offense. Cf. *Heike* v. *United States*, 217 U. S. 423.

Nothing illustrates better the absence of any aggrievement in the case at bar than a consideration of petitioner's position in the event that reinstatement of the prosecution against him in the Southern District were ordered. There would then be two indictments pending against him. The Attorney General, acting within his well-recognized powers (*infra*, pp. 37–39), would have the right to elect under which of the two indictments he would prosecute. Obviously, for the reasons given to the District Court in requesting dismissal of the Southern District indictment (R. 22–27, 40–42, 53–55), he would choose not to proceed under that indictment but rather under the one now pending in the Western District. The court for the Southern District might then dismiss the Southern District indictment for want of prosecution, which would have exactly the

[17] This distinction has been recognized in Rule 48 (a) of the Federal Rules of Criminal Procedure (*supra*, p. 4), which states that a district court has no power to allow dismissal during trial, without the consent of the defendant.

same effect as the *nolle prosequi* dismissal already entered.

We have found no decision that a court will make the choice for the Attorney General as to which indictment he must prosecute, if jurisdiction lies in more than one court. On the contrary, the pertinent authorities are the other way.

In *Pomerantz* v. *United States*, 51 F. 2d 911 (C. A. 3), the indictment upon which defendant was tried and convicted was returned later than an indictment in another district charging the same offense. The first indictment was dismissed by *nolle prosequi* six days after return of the second indictment. These circumstances are identical with the case at bar, except that in our case petitioner has not yet been convicted and is not yet before this Court seeking review on the merits of a conviction. The defendant argued on appeal that the prior indictment vested exclusive jurisdiction in the first district court. The Court of Appeals held that the court in the second district had jurisdiction to try the case regardless of the first indictment, relying on this Court's decision in *Haas* v. *Henkel*, 216 U. S. 462. Thus the District Court in the Western District of Texas will be entirely justified in proceeding with the trial of petitioner, even if it were to be held that his indictment in the Southern District should be reinstated. There being jurisdiction and venue in both the Southern and Western

Districts, the power of the district in which the second indictment is returned is in no way hampered by the circumstance that a previous indictment has been returned in another district.

This was made very clear by the Court in *Haas* v. *Henkel*, 216 U. S. 462. Indictments were returned against the defendant in both the District of Columbia and in New York. Removal was sought on the District of Columbia indictments, which was opposed by the defendant on the ground that indictments for the same offense had been returned in New York, and that this was the defendant's residence. The defendant introduced the New York indictments at the removal hearing and claimed that they were a bar to his removal and trial in the District of Columbia. Removal was had, and was upheld by this Court. It was held that the New York indictments did not alter the fact that the District of Columbia indictments showed probable cause, and, jurisdiction existing in both places, the District of Columbia had the right to try the defendant on the indictments returned there, irrespective of the circumstance that jurisdiction was also proper in New York. This Court expressly stated that choice of the jurisdiction in which to prosecute was that of the Attorney General, saying, of offenses committed in more than one district (216 U. S. at 474):

> In such a case § 731, Rev. Stat., makes it cognizable in either. *But, if indicted in*

> *two or more districts, there must be an election as to where the defendant shall be tried. Primarily, this is the right and duty of the Attorney General, or those acting by his authority.* [Emphasis added.]

In contending that injury is not a requisite to appealability, petitioner says there is an analogy in judgments of non-suit in civil actions (Pet. Br. 26–27). These cases, presented to and rejected by the court below (R. 94–96), do not aid petitioner, since appeal in such cases is permitted only where there has in fact been an aggrievement of the defendant. Thus, in *Cybur Lumber Co.* v. *Eckhart*, 247 Fed. 284, 285 (C. A. 5), upon which petitioner particularly relies, the court cited examples where allowance of a non-suit in a civil action might defeat a right of and result in injury to the opposing party "as where the pleadings of the defendant entitle him to cross-relief, or to a decree against the plaintiff, or where his counterclaim would be barred by the statute of limitations if the plaintiff was allowed to dismiss his action". See also *Williams* v. *Breitung*, 216 Ill. 299, 303, 74 N. E. 1060, 1064. Unlike a non-suit entered in a case in which the defendant had some affirmative right to relief, dismissal of this indictment in the Southern District could not, in and of itself, possibly injure petitioner.

B. The order of dismissal does not constitute an appealable final order, since it does not terminate the prosecution relating to the income tax matters in controversy

A second obstacle to petitioner's standing to appeal is presented by the absence of an appealable final order. The kind of a decision having the requisite degree of finality necessary for appeal in a criminal case was clearly defined by Chief Justice Hughes in *Berman* v. *United States*, 302 U. S. 211. In that case the Court of Appeals had held that, since sentence had been imposed but suspended, the judgment was interlocutory, thus necessitating dismissal of the appeal. This Court reversed, explaining what constituted an appealable final decision in a criminal case as follows (302 U. S. at 212-213):

> Petitioner was convicted and sentenced. Final judgment in a criminal case means sentence. The sentence is the judgment. * * * Here, the imposition of the sentence was not suspended, but only its execution. The sentence was not vacated. It stood as a final determination of the merits of the criminal charge. To create finality it was necessary that petitioner's conviction should be followed by sentence * * * but when so followed the finality of the judgment was not lost because execution was suspended. In criminal cases, as well as civil, the judgment is final for the purpose of appeal "when it terminates the litigation * * * on the

> merits'" and "leaves nothing to be done but to enforce by execution what has been determined."

See also *Korematsu* v. *United States*, 319 U. S. 432, 435. Since the prosecution against petitioner has not been terminated on the merits by the order dismissing the Southern District indictment, that order is not "final for the purpose of appeal".

In *Cobbledick* v. *United States*, 309 U. S. 323, the Court held that an order denying a motion to quash a subpoena was not a final decision within the meaning of the statute authorizing appellate review. Mr. Justice Frankfurter, for the Court, made a thorough study of appellate jurisdiction, beginning with the first Judiciary Act of September 24, 1789. His words point up the necessity of finality and the danger of delay inherent in piecemeal appeals (309 U. S. at 324–327):

> Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all. * * * To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause. These considerations of policy are especially com-

> pelling in the administration of criminal justice. * * * [E]ncouragement of delay is fatal to the vindication of the criminal law. Bearing the discomforture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship. The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal. * * *.
>
> In thus denying to the appellate courts the power to review rulings at *nisi prius*, generally, until after the entire controversy has been concluded, Congress has sought to achieve the effective conduct of litigation. For purposes of appellate procedure, finality—the idea underlying "final judgments and decrees" in the Judiciary Act of 1789 and now expressed by "final decisions" in § 128 of the Judicial Code—is not a technical concept of temporal or physical termination. * * * "In a certain sense finality can be asserted of the orders under review, so, in a certain sense, finality can be asserted of any order of a court."

This makes it very clear that the "final decision" in the Judicial Code means the same in a criminal case as the "final judgments and decrees" in the first Judiciary Act of 1789, and as the "final judgment" in a criminal case of which Chief Justice Hughes and a unanimous Court spoke in *Berman* v. *United States*, 302 U. S. 211.

Petitioner thus finds himself upon the horns of a dilemma as regards his claims of finality and aggrievement. His claim of finality rests upon an attempt to treat the order of dismissal as one finally terminating his prosecution in the Southern District (Pet. Br. 24–26). His claim of aggrievement seems to rest upon the pendency of the Western District indictment. If it is necessary to join the dismissal in the Southern District with the return of the new indictment in the Western District for the purpose of demonstrating that he has been injured and to avoid mootness, petitioner cannot then at the same time disassociate and separate the two indictments in the two districts for the purpose of alleging finality of the action on the Southern District indictment. If the dismissal is to be viewed in conjunction with the second indictment, then the order of the Southern District is obviously not a final order, but simply an intermediate and interlocutory step in the criminal proceedings against him. Those proceedings can then only be made final for purposes of appeal by petitioner's conviction and sentencing following trial in the Western District. All rulings of which he complains must await appellate review on an appeal from such a conviction. *Berman* v. *United States*, 302 U. S. 211; *Heike* v. *United States*, 217 U. S. 423; see also *infra*, pp. 46–47.

C. The order of dismissal does not appear to be appealable under any of the exceptions to the final order rule, and is not subject to review by prerogative writ

In an attempt to avoid the apparent absence of aggrievement and the rule of finality, petitioner seeks (1) to bring his case within the exceptions which this Court has made to the final order rule in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541; *Swift & Co.* v. *Compania Caribe*, 339 U. S. 684; and *Stack* v. *Boyle*, 342 U. S. 1, 6 (Pet. Br. 27–28); or (2) review by way of mandamus and prohibition (Pet. Br. 28–29). Petitioner contends that, if he is required to go to trial on the second indictment in the Western District, the question of whether the indictment in the Southern District was properly dismissed would not be merged in the final judgment in the Western District, and, at any rate, it would then be too late effectively to review the question (Pet. Br. 27–28).

1. We understand *Cohen*, *Swift* and *Stack* to establish these principles: "An order that does not 'terminate an action' but is, on the contrary, made in the course of an action, has the finality that § 1291 requires for appeal if (1) it has 'a final and irreparable effect on the rights of the parties', being 'a final disposition of a claimed right'; (2) it is 'too important to be denied review'; and (3) the claimed right 'is not an ingredient of the cause of action and does not require consideration with it'." See *United*

States v. *Cefaratti*, 202 F. 2d 13, 16 (C. A. D. C.), certiorari denied, 345 U. S. 907.

Applying these principles to the instant case, petitioner does not appear to have shown that he is entitled to any of these exceptions to the rule of finality. Contrary to petitioner's statement (Pet. Br. 27–28), the proceedings on the motion to dismiss in the Southern District will be merged in a final judgment in the Western District. For, as petitioner told the Court of Appeals (R. 88), he has already incorporated the proceedings on the motion to transfer in the Southern District into the record of the proceedings on the second indictment in the Western District. Furthermore, he has moved in the Western District to dismiss that indictment or to transfer it to the Southern District on the grounds that he had a vested right to be tried in the Southern District (R. 87–88).[18] He will have a further opportunity before trial to renew or present additional motions to preserve his allegation of error. *Cogen* v. *United States*, 278 U. S. 221, 224.[19]

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[18] See also the reporter's transcript from the Western District of Texas, on file with this Court, which incorporates in full the motion reply, order, etc., on the transfer in the Southern District.

[19] Indeed, if this Court considered the case on the merits and overruled petitioner at this time and he was therefore forced to trial in the Western District he may perhaps have a second bite at the apple. If the principles of *res judicata* do not bar, he possibly can relitigate the same issues on appeal, after conviction, having saved them for review by his motion to dismiss and to transfer the indictment.

There is likewise no merit to petitioner's other contention (Pet. Br. 28) that it will be too late to review effectively the dismissal order in the Southern District after conviction and sentencing on the second indictment in the Western District. If petitioner's contentions are correct that Judge Kennerly abused his discretion in dismissing the Southern District indictment (Pet. Br. 19–23), and that petitioner in fact had a vested right to have his trial in Laredo by virtue of the transfer order (Pet. Br. 12–19), then it follows that petitioner would have been improperly tried on the second indictment in the Western District and he would be entitled to a reversal.

Unlike the situation in the *Cohen, Swift* and *Stack* cases where irreparable injury would have been done the petitioners if their injuries were not redressed at that juncture, petitioner will not have been hurt if his appeal must await the final disposition of the case in the Western District. For, as we have shown, his alleged right to be tried on the first indictment in the Southern District has not yet been finally disposed of, will not be denied ultimate review, and is now an ingredient of the cause of action in the Western District. Therefore, what petitioner's contention amounts to, when reduced to its essence, is that he will be put to the inconvenience and expense of a trial before he can be heard on his contention of error. But if a defendant is to be allowed to appeal prematurely from adverse rulings because if up-

held the trial would have been in vain, the salutary rule against piecemeal appeals will have been defeated. This Court has long held that this possibility does not warrant departure from the rule of finality. *Cobbledick* v. *United States*, 309 U. S. 323, 325; *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 30; *Heike* v. *United States*, 217 U. S. 423.

2. The only possibility of which we are aware, and we mention this with great hesitation in view of the strong and desirable policy against permitting piecemeal appeals, is the recognition of a new exception to the rule of finality. Such an exception has been put forward to permit an appellate court, which has heard argument on the merits of some matter which is found to be not properly appealable, nevertheless to determine the issues raised if the court finds, as did the First Circuit in *Holdsworth* v. *United States*, 179 F. 2d 933, 935, that "the practical need for clarification overcomes the reluctance to issue what may be termed obiter dictum". In the instant case, the course of further proceedings under the Western District indictment should be greatly simplified, with a resulting avoidance of the possibility of substantial delay and expense, by a definitive ruling from this Court on the matters relating to the merits on which certiorari was granted.

3. If the issues relating to the merits are reviewable under some exception to the rule requiring a final appealable judgment, there is no

need to consider the application for the issuance of the prerogative writs of mandamus and prohibition sought by petitioner from this Court in No. 202 Misc., which is now pending on petition for leave to file. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541. On the other hand, if the District Court's order of dismissal is not appealable, there is no occasion for this Court to grant the extraordinary relief of mandamus or prohibition. The isuance of such writs is not only a matter of sound discretion, but is narrowly restricted to those cases in which the writ is necessary to protect appellate jurisdiction. 28 U. S. C. 1651 (a) (*supra*, p. 4); *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 25; see also Rule 30 of the Revised Rules of the Court.

The traditional use of the writs in aid of the appellate jurisdiction has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. They have also been used where appellate review would otherwise be defeated. Such were the cases cited by petitioner.[20] The court in the Western District exercised jurisdiction which it had lawfully acquired over both petitioner and the offense

[20] *United States* v. *Smith*, 331 U. S. 469; *Maryland* v. *Soper*, 270 U. S. 9, 30; *Virginia* v. *Rives*, 100 U. S. 313, 329; *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329 (C. A. 2), certiorari denied, 340 U. S. 851; *Atlantic Coast Line R. Co.* v. *Davis*, 185 F. 2d 766 (C. A. 5).

involved in the indictment. When that court refused to transfer the case or to dismiss the indictment returned by a grand jury of its district for an offense allegedly committed there (R. 87–88), there was no repudiation of jurisdiction but, on the contrary, a lawful exercise of it. Petitioner will not be deprived of his appellate review of the Western District's denial of these motions at the appropriate time, in the event of a conviction. The petition for leave to file in No. 202 Misc. should be denied.

Petitioner's application for a writ of certiorari also covered the denial of his request made to the court below for writs of mandamus and prohibition requiring Judge Rice of the Western District of Texas to stay the proceedings on the indictment returned in that district [21] (R. 89–90). Since Judge Rice subsequently granted a con-

[21] Petitioner says (Pet. Br. 28–29) that the court below could also have ordered Judge Rice to transfer the proceedings on the second indictment to the Southern District. However, petitioner did not ask the court below for that relief, merely that it stay the proceedings (R. 89–90).

In any event, the second indictment could not have been transferred for trial to the Southern District since the venue allegations of filing the false return were not alleged as having also occurred in the Southern District, but only in Austin, in the Western District, where the Internal Revenue office was located. Moreover, Rule 21 (b), Federal Rules of Criminal Procedure, requires that the transfer shall be in the interest of justice, and Judge Kennerly had already found that justice required the case to be tried away from the Southern District (R. 78).

tinuance, on motion of the government, until after disposition of the case in this Court, there is no longer any occasion to issue the writs in order to preserve the status quo. Thus this phase of the case has been rendered moot.

II

BY GRANTING PETITIONER'S MOTION CHANGING VENUE FROM ONE DIVISION TO ANOTHER IN THE SOUTHERN DISTRICT, THE COURT DID NOT LOSE ITS DISCRETIONARY POWER TO PERMIT DISMISSAL OF THE TRANSFERRED INDICTMENT ON MOTION OF THE GOVERNMENT

For the reasons set forth above, the order dismissing the Southern District indictment is not subject to review by prerogative writ (*supra*, pp. 47–49), and does not appear to be appealable (*supra*, pp. 33–47). However, as we have already indicated (*supra*, p. 33), we would prefer, if possible, to have a decision on the merits, so as to expedite and simplify the ultimate disposition of the Western District prosecution.

1. Petitioner's basic contention (Pet. Br. 12–19) relates to the District Court's claimed total lack of power, under the Federal Rules of Criminal Procedure, to grant the government leave to dismiss an indictment, following a change of venue, over the indicted defendant's objection, even at a time when no date for trial had been fixed or requested by the defendant. This claim is advanced in absolute terms and as admitting of

no exception, no matter how strongly the interests of justice would be better served by permitting the dismissal. This novel contention is wholly unsupported by the language, purposes or history of the applicable rules. Furthermore, no court has either held or suggested that under the rules such a limitation on the court's discretionary power to approve a dismissal was ever contemplated.

Thus petitioner argues that, when Judge Kennerly of the Southern District granted the motion to transfer the case from the Corpus Christi Division to the Laredo Division, venue was forever lodged in the latter place, with the result that if petitioner is ever to be tried for willful evasion of his 1949, 1950 and 1951 income taxes it must be at Laredo.

2. In support, petitioner seizes upon the language of Rule 21 (c) (*supra*, p. 6), which provides that upon transfer of a case "the prosecution shall continue in that district or division", saying: "[t]his is a mandatory requirement that, once there has been an order of transfer, the prosecution shall continue in the second court" (Pet. Br. 14). There is nothing in the history, text, or context of Rule 21 (c) to support petitioner's contention that the rule was intended to vest an irrevocable right in him to have his trial in the district of transfer at all costs. To the contrary, the purposes of Rule 21 (c), which deals only

with the mere mechanics of a transfer, are apparent on its face. It simply provides that the clerks will transmit and receive the papers in the proceeding and that the prosecution shall then continue in the new district or division.[22] If more is needed to show that Rule 21 (c) was meant to be simply explanatory of the transfer proceeding, and nothing else, it is to be found in the original wording of the phrase when it appeared as part of Rule 40 (c) (2) in the Preliminary Draft of the Rules of Criminal Procedure: "and the proceeding shall continue in that district or division as if the indictment or information had been filed there".

Rule 48 (a) authorizing "leave of court" to dismiss an indictment is not expressly or by implication subject to a limitation that it applies in all situations except where there has been a

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[22] That there was no purpose by Rule 21 (c) to make an irrevocable transfer is also shown by the notes of the Advisory Committee on the Rules of Criminal Procedure. Their note to subdivision (c) of Rule 21 refers the reader to Rule 20, which also uses the identical phrase "the prosecution shall continue in that district". Despite this language, the next sentence in Rule 20 contemplates a situation where the prosecution does *not* continue in that district. The next sentence reads: "If after the proceeding has been transferred the defendant pleads not guilty, the clerk shall return the papers to the court in which the prosecution was commenced and the proceeding shall be restored to the docket of that court."

transfer of a case under Rule 21, as petitioner argues. This rule provides:

> The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

Thus the rule expressly limits the court's power to dismiss without the defendant's consent only to cases where the trial has begun, thereby preserving the common law rule that a *nolle prosequi* could not be granted over a defendant's objection once trial had begun, without operating as a bar to further prosecution. See Orfield, *Criminal Procedure From Arrest to Appeal* (N. Y. Univ. Press, 1947), pp. 338–340. If a further limitation on the court's *power* had been contemplated, as suggested by petitioner, it would most certainly have been spelled out. Obviously the fact of transfer has no bearing on the power of the court to dismiss in a proper case.[23]

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[23] The occasions when a proceeding on an indictment would not "continue" in the new district or division are the same occasions in which a proceeding on an indictment would not continue in the original district. Thus the court could dismiss the indictment for want of prosecution under Rule 48 (b). This course would apparently have been abhorrent to petitioner who is insistent on being prosecuted in Laredo. The court could also grant "leave of court" to dismiss the indictment or counts thereof under Rule 48 (a) for a number

3. As a facet of his argument relating to the alleged lack of power to dismiss, petitioner contends that the Attorney General no longer can make a choice of the place of prosecution on two indictments pending in different districts, since the end result is to cause a transfer and Rule 21 provides that transfers can be made only on motion of the defendant. In support of this contention, petitioner quotes part of a sentence from the notes of the Advisory Committee on the Federal Rules of Criminal Procedure. The quoted portion states that the right to move to transfer is not extended to the prosecution (Pet. Br. 16). The Advisory Committee's complete statement is as follows:

> The rule provides for a change of venue only on defendant's motion and does not extend the same right to the prosecution, since the defendant has a constitutional right to a trial in the district where the offense was committed. Constitution of the United States, Article III, Sec. 2, Par. 3; Amendment VI. By making a motion for

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of reasons. For example, a court could authorize dismissal, where there has been a substantial sentence for another offense growing out of the same activity, or where the defendant has pleaded guilty to some counts of an indictment (*United States* v. *Doe*, 101 F. Supp. 699 (D. Conn.)) or where, as in the instant case, a grand jury in a different district has returned an indictment for the same offense (*Haas* v. *Henkel*, 216 U. S. 462; *Pomerantz* v. *United States*, 51 F. 2d 911 (C. A. 3); cf. *United States* v. *Thompson*, 251 U. S. 407).

> a change of venue, however, the defendant waives this constitutional right.

Petitioner's argument is thus squarely rebutted by the reason specifically given by the Advisory Committee for not extending the right of transfer to the prosecution, *i. e.*, because of the constitutional right of a defendant to trial where the offense was committed.[24] In the instant case, the offense was also committed in the Western District. There is therefore no question of transgressing on a constitutional right of petitioner. The Committee's explanation conclusively demonstrates that there is no policy of Rule 21 (b) which could be violated by the action of dismissal in the instant case and the prosecution of petitioner on an indictment in a different district in which the offense was also committed.

The Advisory Committee further pointed out that the effect of Rule 21 is to modify the existing practice under which the government had the final choice of jurisdiction where the prosecution is to be conducted, stating that now the matter will be left to the discretion of the court. That this is so and a court may now cause a transfer

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[24] Although the Advisory Committee did not limit the language quoted above to subsection (a) of Rule 21, it is patent that the Committee's discussion of the constitutional limitation of trial to the district of the offense could not have been referring to Rule 21 (b) which pertains to transfers for offenses that are "committed in more than one district or division".

at the instance of a defendant does not operate to prevent, in a proper case, grand juries of different districts from returning indictments for the same offense against a defendant, and the government from securing "leave of court" to dismiss one of them under Rule 48 (a). Nor is the intent of Rule 21 that "the matter will now be left in the discretion of the court" thwarted in the instant case, since, as shown below at pp. 60–75, Judge Kennerly (a) concluded that the interests of justice would best be served by having the case tried outside the Southern District, and (b) properly exercised his discretion in this regard.

4. Moreover, Judge Kennerly, who granted the motion to transfer to Laredo, was the same district judge who later granted "leave of court" to dismiss the indictment. If necessary, Judge Kennerly's order dismissing the indictment may be viewed as also undoing what he had done in transferring the case to Laredo. Interlocutory orders are not res judicata. However conclusive in its character a judgment, decree or other order may be, it remains under the control of the court which pronounces it. *Bronson* v. *Schulten*, 104 U. S. 410, 415. Judge Kennerly's jurisdiction was coextensive with the judicial district and the Laredo Division was as much within his jurisdiction as the Corpus Christi Division. Cf. *Rosencrans* v. *United States*, 165 U. S. 257, 263. If we view the "leave of court" to dismiss as being

(1) an order vacating the transfer to Laredo and (2) an order dismissing the indictment, both were within Judge Kennerly's power. *United States v. Bryson,* 16 F. R. D. 431, 435 (N. D. Cal.); *Ex parte Altman,* 34 F. Supp. 106, 108 (S. D. Cal.)

III

THE ORDER DISMISSING THE SOUTHERN DISTRICT INDICTMENT CONSTITUED A PROPER EXERCISE OF DISCRETION

A. *The court did not misconceive its functions in permitting the dismissal*

In requesting reversal of the order granting "leave of court" to dismiss the Southern District indictment, petitioner first suggests (Pet. Br. 19–23) that Judge Kennerly did not understand that he had any discretion in the matter. Petitioner claims that the judge "clearly assumed that he had no discretion to deny the Government's motion to dismiss, or that if he had a measure of discretion, it was so limited and circumscribed as to be practically unavailable" (Pet. Br. 21). This contention is directly rebutted by a mere reading of his opinion in context (R. 78–80) together with his statement made during the course of the hearing when he overruled the government's contention that petitioner had no standing to object to the entry of the order of dismissal (R. 48–49).

At the hearing Judge Kennerly explained (R. 48–49):

> I repeat, counsel, that the wording of the rule contemplates that there is some—I don't know how much—discretion with the Judge of the Court. In exercising that discretion, I think I ought to have the facts. If the defendant in the case has any facts he wants to present to me, whether from the District Attorney or otherwise, in the exercise of that discretion, if I have that discretion, I think I should hear it * * *.

In his opinion, he states (R. 79): "Under the rule * * * evidently there is some discretion in the Court as to the matter of whether the case should or should not be dismissed." He also stated (R. 79):

> In twenty-four years on the bench in this district, I do not recall ever having at any time hesitated to dismiss a case when requested by the Government. That was of course under the old law, and under the present rules. If I have a discretion under the rules now as to whether this case should or should not be dismissed, I must exercise that discretion and allow it to be dismissed, because I do not think that the defendant, either in the hearing this morning or in this enormous record on the question of change of venue, has shown any reasons why the case should not be dismissed.

The above quotations, together with Judge Kennerly's conduct of the hearing and his full ex-

planation of his reasons for granting the dismissal, completely refute petitioner's contention that the judge may have misconceived his functions. Not only did he conduct a full hearing on the motion, over the Government's opposition, but he allowed petitioner to present evidence opposing the dismissal and heard argument from both sides (R. 37–77). He also based his decision on the documents filed in the transfer order (R. 78). Judge Kennerly's action on the dismissal was thus based on all information he could secure to aid him.

Furthermore petitioner fails to set forth at any point in his brief the specific reason Judge Kennerly gave for granting the dismissal. In his opinion on the dismissal order, the judge adverted to his previous order transferring the case to Laredo and to his belief that he had been limited to where he could send the case, saying, in relation to the present dismissal motion (R. 78–79):

> In * * * examining the record, I reached this further conclusion, that I gravely doubted whether in the administration of justice generally, the case should be tried in this district at all. I reached that conclusion, not as favoring either the Government or the defendant, but more from the standpoint of a judge who is charged with the administration of justice in the district.

> But when I came to examine the law, I found that I was without power to transfer the case outside of the Southern District of Texas. * * * If I had had that authority I would have sent it to Amarillo, or Sherman, or Texarkana, or some of those places as far removed from the scene of the troubles as I could, or as I could find. I would have done that not, as I say, to favor either the defendant or the Government, because I feel that justice in the case would be best administered by transferring the case to one of those places.

Judge Kennerly's conclusion that justice would be best administered by trial of the case "far removed from the scene of the troubles" was not mechanical or automatic; it was a logical and sound judgment in the matter, reached after due deliberation. In this setting, the judge then added that petitioner had not shown any reasons why the case should not be dismissed (R. 79). Manifestly, Judge Kennerly was exercising a real discretion in authorizing the dismissal. This exercise of discretion by the trial judge should not be lightly overturned by an appellate court.

B. *The dismissal was proper in view of the finding that the interests of justice would be best served by having the case tried outside the Southern District*

Throughout his brief, petitioner keeps implying that, if Judge Kennerly exercised any discretion at all, he acted so arbitrarily that his order dismissing the indictment constituted an abuse of dis-

cretion, warranting reversal by this Court and an order compelling the government to abandon the Western District prosecution and to proceed with prosecution of the first indictment in the Southern District (Pet. Br. 12–19, 22–23). Petitioner's grounds are: (1) the government had "originally sought an unfair advantage" by first bringing the case in Corpus Christi, in the Southern District, rather than at Austin, in the Western District, which had been the prevailing practice for twenty years (Pet. Br. 17–18); and (2) the government's subsequent course in securing leave of court to dismiss the first indictment in the Southern District and reindicting petitioner at Austin should not be sanctioned, because the result was to evade and render a nullity the transfer to Laredo, and "the prosecution cannot create for itself a transfer power, by a misuse of the power to terminate" (Pet. Br. 16).

1. *Return of the first indictment in Corpus Christi:* A number of perfectly legitimate reasons existed for bringing the prosecution originally at Corpus Christi rather than at Austin. As Judge Kennerly was informed, the government was faced with a serious personnel problem in the Western District of Texas, involving the impending departure of the then incumbent United States Attorney for that district and his staff, with the prospect, since realized, that there would be a very substantial change of that staff during the

time between presentation of the case to the grand jury and its trial (R. 39–40). The problem did not exist in the Southern District since the new United States Attorney had already taken office (*ibid.*).

Moreover, the action of the government in originally bringing the indictment in Corpus Christi comported with the policy enunciated by this Court that a law should be construed to permit the trial of a defendant in his vicinage if possible. *United States* v. *Johnson*, 323 U. S. 273. It likewise comported with the then fairly recently adopted policy of securing wider geographic distribution of tax evasion prosecutions by spreading them throughout the judicial districts, so as to publicize the penalties for violating the income tax laws.[25] Because of simplicity of proof, the manner of tax evasion usually alleged is the filing of the false return where the District Director's office is located. However, in many states there is one Internal Revenue Collection District covering two or more judicial districts. This means that the tax evasion cases for such a state will be centered in the judicial district where the Director is located, rather than at the places of residence of the taxpayers, and the exemplary warning that these prosecutions bring would therefore not be diffused throughout the state.

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[25] Lyon, *The Crime of Income Tax Fraud: Its Present Status and Function*, 53 Col. L. Rev. 476, 478 (1953).

In those cases where there is evidence of affirmative acts of tax evasion in a judicial district where no return is filed, the taxpayer may be prosecuted where these acts occur. *Spies* v. *United States,* 317 U. S. 492, 499. Mindful of the deterring effect of an income tax prosecution on possible tax evaders located in the other judicial districts of a state, the government has, in appropriate cases, emphasized additional evidence showing that affirmative acts were taken by a tax evader in a "non-Director's" judicial district. Thus the records of this Court show that an indictment of that kind was returned in 1952 in *Beaty* v. *United States,* 213 F. 2d 712 (C. A. 4), judgment vacated and remanded on other grounds, 348 U. S. 905, reaffirmed, 220 F. 2d 681, certiorari denied, 349 U. S. 946; and in 1953 in *United States* v. *Albanese,* 224 F. 2d 879 (C. A. 2), certiorari denied, 350 U. S. 845. The United States Attorneys' Manual, prepared by the Department of Justice, states (Title 4, p. 44):

> Most criminal tax offenses arise under the Internal Revenue Code and involve the filing or nonfiling of returns with a particular Director of Internal Revenue. * * * In the usual case, therefore, the offense is committed in the judicial district in which the Director's office is located. Consequently, in those States which have two or more judicial districts but only one internal revenue collection district, the

> great majority of tax prosecutions will be instituted in the one judicial district in which the Director's office is located. However, in an effort to cause the widest possible geographical distribution of tax prosecutions, the Department has encouraged the development of investigative facts which would provide a basis for venue in the residence district of taxpayers in those instances in which the returns are filed in other judicial districts.[26]

Petitioner's was such a case; the indictment was first brought in petitioner's district of residence, the Southern District of Texas, and in Corpus Christi, taxpayer's home division within the Southern District. In thus bringing the prosecution in Corpus Christi, the government was not departing from practice, but was in fact implementing a policy then in existence, albeit a practice that had not theretofore reached the Southern District of Texas.

Petitioner says that the "Government's initial preference to try the case in Corpus Christi must have been due to its desire to avail itself of the prejudice there" (Pet. Br. 17). Petitioner asks this Court to penalize the government by requiring it to continue the prosecution at Laredo, so that "[i]f as a result of picking an unfair forum it lost the chance to prosecute at Austin, the Government has learned the risks of an original

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[26] The quoted matter is identical both in the sheet in the current manual and in the superseded sheet dated November 1, 1953.

unfair choice" (Pet. Br. 18–19). But petitioner's display of indignation is belied by his own action in preferring Corpus Christi over any place-of-trial other than Laredo. Before Judge Kennerly had rendered his decision that prejudice existed against petitioner in Corpus Christi and that his case should be transferred, petitioner had told the court (R. 17):

> We wish to be clearly understood that if the case is not to be transferred to Laredo we prefer that it remain in Corpus Christi.

The United States Attorney stated that he had supposed that petitioner would have been satisfied to try his case on his home grounds (R. 41). The government had a choice of bringing the prosecution in Austin or Corpus Christi. The evasion did not occur at Laredo and the government could not have alleged venue there. Petitioner has resisted trial at Austin, the only other place, besides Corpus Christi, where venue would have been proper, absent a waiver by petitioner. In these circumstances, the government could not have been seeking an unfair advantage in bringing the first indictment in Corpus Christi when petitioner has insisted on being tried there if not in Laredo.

Moreover, petitioner's insistence on Laredo over Corpus Christi is subject to the inference that it was for a purpose other than interest in a fair trial. When petitioner requested transfer

of his case from the Corpus Christi Division, petitioner's place of residence, to the Laredo Division, the seat of his political power, the government vigorously opposed it (*supra*, pp. 10–12). A transfer to secure a fair trial, the government did not oppose (R. 124). It made no objection to transfer to the Houston or Galveston Divisions of the Southern District nor to transfer to another judicial district, but filed answering affidavits strongly indicating that the government could not secure a fair trial at Laredo.[27] The principal source of the prejudice alleged by petitioner was from the influence of three newspapers. Although it was true these newspapers had much greater circulation in Corpus Christi, the government pointed out that nevertheless their circulation was still fifty times greater in Laredo than, for instance, in Houston (R. 125).

If petitioner's real purpose had been to avoid the alleged baleful influence of those newspapers, then he should have sought a transfer to one of those other divisions of the Southern District where the newspapers' influence was much smaller. While Judge Kennerly stated on April 27, 1955, that the government would not "be under a severe handicap" by trial at Laredo (R. 18–19), this conclusion must be read with Judge Kennerly's statements on May 16, 1955, that he

[27] See footnote 6, *supra* p. 11.

"gravely doubted whether in the administration of justice generally, the case should be tried in [the Southern D]istrict at all" and that the case should have been sent as far from the scene of the troubles as could be found (R. 78).

Judge Kennerly believed that petitioner, in moving to transfer his case under Rule 21 (a), Federal Rules of Criminal Procedure, could limit the venue to a particular place of his own choosing, in this case Laredo, and that the court was totally powerless to send it elsewhere for trial (R. 16–18). The government contended that petitioner had no such right and that the trial judge was in error in so holding. The government argued that, if petitioner sought to take advantage of the transfer provisions of Rule 21, he could not conditionally waive his right to trial in the district and division of the crime so as to pick the exact place where he chose that the trial should be held. He was entitled to a fair trial and nothing more. However, Judge Kennerly granted the transfer, and "it is at least doubtful whether the Government had a right to appeal from the order of transfer".[28] *United States* v. *National City*

[28] The cases cited by petitioner, all involving mandamus proceedings, do not support his contention that the government could have sought appellate review of the judge's order of transfer. Thus, in *United States* v. *United States District Court*, 209 F. 2d 575, 576 (C. A. 6), on which petitioner particularly relies, the court found that mandamus was appropriate to resolve the "judicial stalemate" existing because both district courts refused to assume jurisdiction of

Lines, 334 U. S. 573, 594; *Holdsworth* v. *United States*, 179 F. 2d 933, 935 (C. A. 1); cf. *Jiffy Lubricator Co.* v. *Stewart-Warner Corp.*, 177 F. 2d 360 (C. A. 4), certiorari denied, 338 U. S. 947.

If there be error in the record, it is in Judge Kennerly's view that, under Rule 21 (a) of the Federal Rules of Criminal Procedure, petitioner could force trial in a chosen sanctuary. It has been uniformly held that the provisions found in Article III, Section 2 of the Constitution and in the Sixth Amendment, as to the right of trial in the district, are not jurisdictional and can be waived. *Shetterly* v. *United States*, 205 F. 2d 834 (C. A. 6); *Mahaffey* v. *Hudspeth*, 128 F. 2d 940 (C. A. 10), certiorari denied, 317 U. S. 666; *Hagner* v. *United States*, 54 F. 2d 446 (C. A. D. C.), affirmed, 285 U. S. 427. In accordance with this principle, the Advisory Committee, in reference to Rule 21, stated: "By making a motion for a change of venue, however, the defendant waives this constitutional right" (*supra*, pp. 54–56). Cf. *United States* v. *Gallagher*, 183 F. 2d

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the offense. In the instant case there is no district court conflict. The Southern District Court dismissed its indictment and released its jurisdiction and the Western District Court assumed jurisdiction over the trial under the indictment returned in that district. The issue was not reached in *General Portland Cement Co.* v. *Perry*, 204 F. 2d 316, 318 (C. A. 7). Mandamus was held to be appropriate in *Paramount Pictures* v. *Rodney*, 186 F. 2d 111, 116 (C. A. 3), certiorari denied, 340 U. S. 953, on the ground that the District Court had refused to act. There has been no refusal to act in support of its jurisdiction by any District Court in the instant case.

342 (C. A. 3), certiorari denied, 340 U. S. 913; *United States* v. *Bryson*, 16 F. R. D. 431, 434 (N. D. Cal.).

Thus when petitioner brought his motion to transfer, he necessarily waived the constitutional privilege to have his trial in the district and division of the offense. Inconsistent with this waiver was petitioner's condition that the case be sent only to Laredo. Having executed the waiver of venue, petitioner could not reassert it for the purpose of directing the court where to send the case. The transfer should have been where the court found the administration of justice and fairness, both to petitioner and to the government, required the case to be sent. That Judge Kennerly was conscious of the implications of his decision to transfer to Laredo is apparent when, in the course of his opinion in authorizing the dismissal, he stated he had originally believed that the administration of justice required the case to be sent as far away from the scene of the troubles as could be found (R. 78). If there be any action at all required from this Court on the original indictment in the Southern District at this juncture, it should be a direction to the District Court for the Southern District to transfer the case where it thought the proper administration of justice required it to be sent.

2. *The return of the new indictment in the Western District and the dismissal of the South-*

ern District indictment: There is no merit to petitioner's further contention that the return of the indictment against petitioner by the grand jury for the Western District, which had jurisdiction of the offense, and the government's dismissal of the first indictment pending against petitioner in the Southern District after securing "leave of court" to do so, constituted a misuse of the power to terminate[29] (Pet. Br. 14–19).

If petitioner has committed a crime in the Western District, the power and duty of the grand jury for that district to consider it and re-

[29] In *Ex parte Lancaster*, 206 Ala. 60, 89 So. 721, upon which petitioner relies (Pet. Br. 14–16), the defendant had been indicted in Walker County, the place of the crime, and the case had been transferred for trial to Marion County because of prejudice. When defendant was tried in Marion County, the jury could not agree and a mistrial was declared. The prosecution thereupon had a *nolle prosequi* entered in the case, and reindicted the defendant again in Walker County. Thus, the defendant had already been forced to trial once in the county of transfer and the state was attempting to re-try him in the county where prejudice against the defendant existed. The basis of the decision holding that the trial must be in Marion County was that jurisdiction of the offense had been irrevocably lodged in Marion County and also that there was a state statute forbidding removing the case more than once. In the instant case, exclusive jurisdiction over the offense has not been lodged at Laredo in the Southern District.

Coleman v. *State*, 83 Miss. 290, 35 So. 937, quoted by petitioner (Pet. Br. 16), involved, as noted by the court below (R. 95), a particular statute of the state providing that the county where prosecution is first begun shall have exclusive jurisdiction of the cause. There is no such federal statute or rule. *Haas* v. *Henkel*, 216 U. S. 462.

turn an indictment is unquestioned, and the right and duty of the Government through the Attorney General and the United States Attorney to initiate prosecutions for crime is coterminous with the power of the grand jury. *Haas* v. *Henkel*, 216 U. S. 462, 473–475; *United States* v. *Morgan*, 222 U. S. 274, 281–282; *United States* v. *Thompson*, 251 U. S. 407, 412–415; *Ex parte United States*, 287 U. S. 241, 250–251. That an indictment had also been returned earlier in the Southern District naming petitioner as the defendant cannot vitiate his indictment for the same offense in the Western District. "But, if indicted in two or more districts, there must be an election as to where the defendant shall be tried. Primarily, this is the right and duty of the Attorney General, or those acting by his authority." *Haas* v. *Henkel*, 216 U. S. at 474; see *supra*, pp. 36–39. In making such an election, "it would be the plain duty of the prosecution to take steps to bring the case to trial in that district to which the facts most strongly pointed" (*ibid.*). Cf. *Pomerantz* v. *United States*, 51 F. 2d 911, 912 (C. A. 3). The only modification of the *Haas* v. *Henkel* rule is that the dismissal of one of the indictments is now subject to "leave of court" under Rule 48 (a).

However, this authority was in fact sought and secured. Both Judge Kennerly in the Southern

District and Judge Rice in the Western District properly exercised their discretion that the prosecution should be discontinued in the Southern District and be carried on in the Western District.

Nevertheless, petitioner urges that the sequence of events whereby the new indictment was returned and the old one dismissed after the case was ordered transferred to Laredo shows an attempt to circumvent the court's decision and was "a fundamental evasion of the integrity of the transfer procedure contemplated by Rule 21" (Pet. Br. 19) and was "a device by which the Department of Justice seeks to obtain for itself, and to deny to the courts, the power to choose the forum to which trial of a criminal case may be transferred" (Pet. Br. 22).

The effect of the return of the new indictment in the Western District and grant by Judge Kennerly of "leave of court" to dismiss the first indictment in the Southern District was indeed to negate the transfer order, since the case would not be prosecuted in the Southern District at all. But to say that the effect was to circumvent the court's transfer order and was a fundamental evasion of Rule 21 is to forget that both the transfer and the dismissal motions occurred before Judge Kennerly. There could not

very well be a circumvention or evasion of Judge Kennerly's transfer order by virtue of the dismissal order when Judge Kennerly was also a party to it.

The government fully informed Judge Kennerly of the reasons why the sequence of events made necessary and desirable the request for "leave of court" to dismiss the indictment in the Southern District. It was pointed out to him that, faced with trial in Laredo if the Southern District indictment were to be tried at all, the Assistant Attorney General and the United States Attorney had to make a new judgment about the prosecution. They stated they knew that their witnesses, who were reluctant or hostile, would be subject to greater potential pressure if required to testify so close to the seat of petitioner's political power, and that these witnesses would testify more freely and frankly and more to the truth of the matters to be proved the further removed they were from the American-Mexican border area in which Laredo was located (R. 41–42).[30] The United States Attorney specifically mentioned one witness, a Mr. Benson, who was in the employ of petitioner, had signed the tax

[30] "We would be naive if we did not recognize that witnesses in criminal cases are subject to pressures from all sides." *United States* v. *Bryson*, 16 F. R. D. 431, 436 (N. D. Cal.).

returns and lived in the Laredo area and who might be affected by these considerations (R. 50–53). Further, under the allegations of the first indictment in the Southern District the Government was required to prove affirmative acts of evasion independent of and in addition to proof that petitioner had willfully filed a false income tax return at Austin. It is true, as the United States Attorney stated to Judge Kennerly, that the same witnesses would be used in proving the case under either indictment; but the extent of their testimony and the manner of their testifying and the quality of their evidence might not be of critical importance under the simpler proof involved in the second indictment.

In short, the prosecutors who knew their case, its strength and weaknesses, were required to make a new estimate, and believed that their case would be more appropriately tried in the Western District. If it is the duty of the Attorney General and the United States Attorney to decide when or where to initiate a prosecution, inherent in this is the concomitant responsibility to determine when to discontinue a prosecution.[31]

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[31] The usual occasions for criticism of dismissals have been where it has appeared to the court that the dismissal would result in inadequate or no prosecution and punishment of the defendant. *United States* v. *Doe*, 101 F. Supp. 609 (D. Conn.); *United States* v. *Woody*, 2 F. 2d 262 (D. Mont.). There is no question here of petitioner escaping prosecution for the offense, as a result of the dismissal of the Southern District indictment.

Although it was the duty of the government to make the reappraisal in view of the new circumstances, this was nevertheless subject to review by the District Court when the government moved under Rule 48 (a) for the dismissal. Judge Kennerly held a hearing, allowed petitioner to offer evidence, heard argument from both sides and determined thereafter that the proper administration of justice required that the dismissal of the indictment should be granted since the case should have been tried as far away from the scene of troubles in the Southern District as could be found. "But justice, though due to the accused, is due to the accuser also." *Snyder* v. *Massachusetts*, 291 U. S. 97, 122.

The Government requested the dismissal for proper reasons and Judge Kennerly exercised a sound discretion in the matter, which should be left undisturbed.

CONCLUSION

In the event that this Court agrees with the Court of Appeals that the District Court's order dismissing the indictment is not appealable, the judgment of the Court of Appeals dismissing petitioner's appeal should be affirmed. In the event that this Court reaches the merits of the

District Court's order dismissing the indictment, that order should be affirmed.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

CHARLES K. RICE,
Acting Assistant Attorney General.

GRAY THORON,
Assistant to the Solicitor General.

JOSEPH M. HOWARD,
LAWRENCE K. BAILEY,
Attorneys.

MARCH 1956.

APPENDIX

AFFIDAVITS OF HAYDEN W. HEAD SUBMITTED ON BEHALF OF PETITIONER AND THE GOVERNMENT IN CONNECTION WITH THE CHANGE OF VENUE MOTION

1. Affidavit that petitioner could not expect a fair trial in the Corpus Christi Division

THE STATE OF TEXAS,
County of Nueces, ss:

BEFORE ME, the undersigned authority, on this day personally appeared Hayden W. Head of Nueces County, Texas, known to me to be a credible person, who being first sworn, stated to me under oath the following:

After graduation from the law school of the University of Texas in 1937 and admission to practice in this state, I moved to Corpus Christi where I was employed by the firm of Keys & Holt, a partnership composed of I. W. Keys and Birge Holt, which was engaged in the general practice of law in Corpus Christi. Shortly afterward I was admitted to practice in the United States District Court for the Southern District of Texas. From June of 1937 until the month of September, 1941, when I became a partner in the firm and the firm name was changed to Keys, Holt, & Head, and thereafter until the month of January, 1942, I was actively engaged in the general practice of law in Corpus Christi and during that time tried many law suits in the local courts.

In January, 1942, I left to go into military service and was discharged from the United States Army Air Force in September of 1945, being away from Corpus Christi that entire period. Upon my return to Corpus Christi in September of 1945, I again resumed the general practice of law with the firm of Keys, Holt & Head and continued with that firm until I withdrew from it on February 1, 1948, and engaged independently in the general practice of law in such city until February, 1949, when I moved to Austin, Texas, and there established an office. However, I continued to maintain an office in Corpus Christi and spent a portion of each week there until I moved back to Corpus Christi from Austin on February 1, 1954. At that time I closed my Austin office and have practiced exclusively from my Corpus Christi office since.

Not long following my return after being discharged from the Air Force in September of 1945, I became embroiled actively as one of the leaders in a municipal political controversy in Corpus Christi, in which our effort was the recall of the City Council then in office. One of the principal grounds for which recall was sought, it being given wide publicity, was the alleged political domination of some of the then council members by George B. Parr of Duval County, Texas. Much publicity was given in our fight to recall the council to charges that, through some of the council members, Parr was trying to control the City of Corpus Christi by "political bossism". The council resigned after the filing of a recall petition to which some 4500 signatures

were affixed. This was given the widest possible publicity by newspapers and radio throughout the Corpus Christi Division of the United States District Court for the Southern District of Texas and much of this publicity, in which I personally participated, was directed against George B. Parr.

Continuously since the name of George B. Parr has been brought actively to the attention of the public by accusations of one kind or another made in a great many municipal, county and district elections in said Corpus Christi Division. During the entire period since my return to Corpus Christi from military service there has never been a period of more than a few months during which the said Parr has not been the target of many attacks upon his alleged attempts to dominate this area by political corruption. The most recent attacks of this nature occurred during the campaign to elect to Congress a representative from the 14th District, within which the Corpus Christi Division lies. In that election, State Senator William H. Shireman of Corpus Christi, a candidate for this congressional office, devoted a large part of his campaign by newspaper, radio and speeches at public gatherings to attacks on the said Parr throughout the District, alleging among other things that he controlled the judiciary in Duval and Jim Wells Counties, Texas, from which C. Woodrow Laughlin had been just removed as a district judge by the Supreme Court of Texas. I participated actively in Senator Shireman's campaign in support of his candidacy for Congress and know personally that the attacks made by him on Parr

received widespread publicity throughout the Corpus Christi Division.

Since that time, there has been unceasing publicity throughout this division by newspapers and radio publicizing the recent investigation of Parr and Duval County by the Attorney General of Texas and of the indictment or indictments against the said Parr for alleged income tax evasion in the United States District Court.

It is apparent that during the past several years, I have personally engaged in public opposition to George B. Parr and I know with some intimacy the severity of attacks leveled against him and the publicity given those attacks. It is equally apparent that I am not in sympathy with said George B. Parr. However, I feel it my duty as a citizen of Corpus Christi and as a member of the bar of the United States District Court for the Southern District of Texas to make this affidavit, for it is my very firm belief that as a result of the foregoing facts, so great a prejudice exists against George B. Parr as defendant in the recent indictment or indictments returned against him in the United States District Court for the Southern District of Texas, that he cannot obtain a fair and impartial trial in the Corpus Christi Division. I do not believe that it is possible to select a jury for the trial of any case in this division in which he is involved as a defendant where at least some of the jurors would not be prejudiced against the said George B. Parr.

/s/ HAYDEN W. HEAD.

The foregoing was sworn to and subscribed before me, the undersigned authority, as true and correct on this 4th day of February, 1955, by the said Hayden W. Head, to certify which witness my hand and seal of office.

/s/ ANNA GRACE PIERCE,
Notary Public in and for
Nueces County, Texas.

2. *Affidavit that the government could not expect a fair trial in the Laredo Division*

THE STATE OF TEXAS,
County of Nueces, ss:

BEFORE ME, the undersigned authority, on this day personally appeared Hayden W. Head of Nueces County, Texas, known to me to be a credible person, who being first sworn, stated to me under oath the following:

Heretofore I have made an affidavit relating to George B. Parr which has been filed with the Clerk of the United States District Court for the Southern Division of Texas, Corpus Christi Division, in connection with an indictment or indictments presently pending against the said Parr in such court. In that affidavit I expressed my opinion that the said Parr could not obtain a fair and impartial trial in the Corpus Christi Division of such court.

It is equally my firm opinion that the United States of America could not obtain a fair and impartial trial if the trial of the cause against George B. Parr were transferred to the Laredo Division of such court. I have been a very interested observer of the South Texas political

scene for many years and it is my belief that the situation in the Laredo Division of the United States District Court for the Southern District of Texas is the converse of the situation in the Corpus Christi Division. In the latter division, the defendant could not obtain a fair and impartial trial and in the Laredo Division the government could not obtain a fair and impartial trial.

It is my opinion and belief that such trial could only be had by transfer of this cause to the Houston Division or other division of said court sufficiently removed from Lower South Texas politics that the said George C. Parr would not there have been the controversial and highly publicized figure that he has been throughout Lower South Texas for many years.

/s/ HAYDEN W. HEAD.

The foregoing was sworn to and subscribed before me, the undersigned authority, as true and correct on this 23d day of March, 1955, by the said Hayden W. Head, to certify which witness my hand and seal of office.

/s/ ANNA GRACE PIERCE,
Notary Public in and for Nueces County, Texas.

U. S. GOVERNMENT PRINTING OFFICE: 1956

Supreme Court of the United States

OCTOBER TERM, 1955

No. 202

MICHAEL STELLA, on behalf of himself and all other stockholders of Kaiser-Frazer Corporation,

Petitioner,

—against—

HENRY J. KAISER, JOSEPH W. FRAZER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., WALSTON S. BROWN and KAISER-FRAZER CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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New York 6, New York.

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Supreme Court of the United States

OCTOBER TERM, 1955

No.

MICHAEL STELLA, on behalf of himself and all other stockholders of Kaiser-Frazer Corporation,

Petitioner,

—against—

HENRY J. KAISER, JOSEPH W. FRAZER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., WALSTON S. BROWN and KAISER-FRAZER CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associated Justices of the Supreme Court of the United States:

Michael Stella, a stockholder of Kaiser-Frazer Corporation, acting on behalf of himself and all other stockholders of Kaiser-Frazer Corporation, respectfully prays for the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals entered herein April 11, 1955, affirming the judgment of the United States District Court dismissing his complaint.

Basis of Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. §1254. The original opinion of the Court of Appeals was handed down December 7, 1954 but entry of judgment was stayed by timely filing of a petition for rehearing. On January 3, 1955, the Court entered its order giving leave to file additional briefs covering four questions of law. On April 11, 1955 the Court handed down a supplemental opinion denying the petition for rehearing, and judgment in accordance therewith, was entered April 11, 1955.

Opinions Below

The memorandum opinion of the District Court granting summary judgment is unreported. The original opinion of the Court of Appeals affirming the order of the District Court is reported in 218 Fed. (2d) 64. The opinion of the Court of Appeals denying the petition for rehearing is not yet reported.

Court Rule Involved

Rule 23(c) F. R. C. P. provides in its pertinent portion:

> "(c) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. * * *"

Questions Involved

The question here presented is whether an order of a federal district court pursuant to the above Rule, and a release given pursuant to a compromise thereby approved, is conclusive in favor of persons not parties to the action compromised or to the proceeding leading to the approval of the compromise so as to prevent the release, as to such persons, from being attacked for fraud. This question, which is one of first impression, arises out of the following facts:

The instant case, a stockholders' derivative action, was filed in the federal District Court in New York against allegedly wrongdoing corporate officers and directors. A similar action by other stockholders was thereafter filed in the federal District Court in Michigan. An agreement of settlement was made between the stockholder plaintiffs in the Michigan action, the corporation, and certain individual defendants. After hearing pursuant to Rule 23(c) F. R. C. P., the settlement was approved over the objection of various stockholders including the stockholder plaintiff in New York. The Michigan Court specifically approved the release of all wrong-doing officers and directors, *including those not parties to the proceeding*, over the objection, among others, that the negotiations leading to the settlement were in fraud of the corporation.

Thereafter the defendants in the New York action, including those not parties to Michigan action and proceeding under Rule 23(c), filed a motion for summary judgment in the New York action which was based wholly on the judgment in the Michigan action and the release approved therein. Petitioner, the

stockholder plaintiff in the New York action, resisted on the grounds (a) that the settlement of the Michigan action was procured by fraud, (b) that the decision in Michigan to the contrary was not *res judicata* or otherwise binding in favor of the defendants in the New York action who were not parties to the Michigan action or the settlement proceedings therein, and (c) that accordingly the release given by the corporation pursuant to the order of the Michigan court was, so far as the omitted defendants were concerned, subject to attack for fraud. The District Court granted summary judgment dismissing the complaint. The Court of Appeals affirmed, disagreeing, however, as to the reasons for their action. The decision and opinions of the majority and minority present the following questions:

Question 1

Is the decision of the federal District Court in Michigan approving the settlement binding in favor of defendant directors not parties thereto by way of *res judicata*, collateral estoppel, or otherwise?

Question 2

Aside from any question as to the conclusive effect of the Michigan decision, is the release given by the corporation to the defendant directors not parties to the Michigan action or proceedings conclusive as against a claim of fraud in the settlement?

The majority of the Court, Judges Learned Hand and Frank, held that the Michigan order was not *res*

*judicata** as to the defendants in the New York action who were not present in Michigan. The majority further held, however, that the release was nevertheless conclusive as to such omitted defendants because the corporation so intended. It failed to explain how this intent could be effective if fraudulently procured by the controlling directors who were releasing themselves, or why, in the absence of *res judicata*, petitioner was precluded from litigating in New York the issue of fraud in procuring the release.

Judge Clark agreed as to the result but not as to the reasoning. In his opinion the corporation's consent to the release was ineffective against a claim of fraud unless the prior decision and order of the Michigan Court was conclusive even as to parties not before the Court. Judge Clark thought it was so conclusive.

Statement

The action herein was brought by petitioner, a stockholder of Kaiser-Frazer Corporation, on behalf of the corporate defendant Kaiser-Frazer against Henry Kaiser and nine other officers and directors of Kaiser-Frazer, to recover for the illegal and negligent expenditure of corporate funds which Kaiser and the other directors caused Kaiser-Frazer to make in the purchase of its own stock in a vain attempt to "stabilize" the market for Kaiser-Frazer shares in connection with a new public offering of such shares. It was alleged that in such stabilization, Kaiser and

* The Court obviously used the term "*res judicata*" in its broad sense to include collateral estoppel. *Cf. Lawlor* v. *National Screen Service Corp.*, No. 163, October Term, 1954, decided June 6, 1955. Since nothing here turns on the distinction between *res judicata* and collateral estoppel we follow the Court below in using the former term to include the latter.

the other individual defendants violated the anti-manipulation and anti-fraud provisions of the Securities Exchange Act of 1934 and the Securities Act of 1933; and in addition, were culpably negligent in wasting Kaiser-Frazer's money* (R. 52a, 19).** In *Stella* v. *Kaiser-Frazer Corp. et al.*, 82 F. Supp. 301, the District Court sustained the complaint as alleging a good cause of action under the Securities Exchange Act of 1934; and overruled defendants' pleas to the jurisdiction and venue and motions to quash extra-territorial service, holding applicable the special venue and service provisions of that Act (R. 52a).

Additional stockholder actions on various claims were pending in other jurisdictions, state and federal. Among these was an action in the federal District Court in Detroit, Michigan. This action, brought after the action below, included a claim for relief based on substantially the same facts. However, this claim was based solely on common law grounds and

* The events relating to this "stabilization" received nation-wide publicity and resulted in multiple litigation. Following the failure of the public offering of Kaiser-Frazer stock, Otis & Co., one of the underwriters, refused to comply with its contract to purchase the new shares, whereupon Kaiser-Frazer sued and recovered judgment for over $3,100,000. This judgment was reversed on the ground that Kaiser-Frazer in its registration statement and prospectus had misrepresented its past profits, with the result that Otis & Co. was released from liability (*Kaiser-Frazer Corporation* v. *Otis & Co.*, 195 Fed. (2d) 838, cert. den. 344 U. S. 956).

** Petitioner's appendix below is numbered 1a to 93a. Respondents' appendix is numbered 1 to 121. The record on a former appeal in the case of *Masterson et al.* v. *Pergament et al.* (copies of which were filed in this Court in support of petition for certiorari No. 133 October Term 1952) was incorporated by reference in respondents' reply affidavit R. 112, 113. This record will be hereafter referred to as P. R. [Pergament record].

jurisdiction was based solely on diversity of citizenship (R. 52, 53). For this reason one of the defendants in the New York action, Brown, was dropped as a party in the Michigan action because his citizenship was the same as that of one of the plaintiffs therein; and service could not be had on certain non-resident defendants. The result was that of the ten individual defendants in the New York action only three were in court in Michigan and parties to the Michigan decree. (*Infra* p. 8, footnote *).

Following the decision of the New York Federal District Court, *supra*, sustaining the complaint, jurisdiction venue and service in the instant case, the individual defendants approached counsel for the stockholder plaintiffs in the Michigan action and concluded an agreement for settlement subject to the approval of the Michigan Court. Negotiations were secret, and petitioner and his counsel were excluded therefrom (R. 53a). The settlement was brought on for approval, in Michigan, pursuant to Rule 23(c). Petitioner and certain stockholder plaintiffs in other actions appeared and contested this settlement as inadequate and as procured by fraud. The District Court nevertheless approved this settlement. *Pergament* v. *Frazer*, 98 F. Supp. 9. The Court of Appeals affirmed, Judge Allen dissenting.* This Court denied certiorari, 346 U. S. 832.

* Judge Allen agreed with opposing stockholders that the settlement was procured by fraud. See her summary (R. 57a-62a). As we read the majority opinion, the majority did not disagree with Judge Allen but affirmed on the ground that whatever the fraud in the negotiations, the situation was thoroughly explored before the District Court and since there was no fraud *on him* he had power to approve the settlement as in the interest of Kaiser-Frazer despite any fraud in the negotiations. See p. 18 *infra* footnote **. The Court of Appeals below, however, disagreed

Thereafter the individual defendants in the New York action whose release had been approved by the Michigan Court, moved for summary judgment in New York solely on the basis of the Michigan order and the release thereby authorized. Petitioner resisted on the ground, among others, that seven of the ten individual defendants in the New York action were not parties to the Michigan action and/or the settlement proceedings therein. The facts in this regard are stated in the footnote below.*.

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with our construction and held that the majority in the Sixth Circuit determined that there was no fraud in the settlement. Since we do not consider this point an appropriate one for certiorari, we will assume, *arguendo*, in this petition that the Court of Appeals in the Sixth Circuit found that there was no fraud in the settlement.

* Defendant Brown was originally a party to the Michigan action but was dropped by amendment because his citizenship, the same as that of one of the plaintiffs, destroyed diversity. Another defendant, Edgar Kaiser, was not named as a defendant in the cause of action in Michigan which arose out of the same facts as the New York action (R. 64a 58, P. R. 22). Three other defendants in the New York action, Sherwood, Trefethen and Motter, were not served and did not appear (R. 8a, 64a). Three other defendants, Bedford, MacDonald and Price, were served and appeared in the action prior to the settlement proceedings (R. 8a).

After the settlement hearing was noticed but before it commenced, the two remaining defendant directors, Henry Kaiser and Joseph Frazer, filed answers to the amended complaint in the action (P. R. 7). In the Sixth Circuit, settlement proceedings are considered in the nature of proceedings ancillary to the principal action and are brought on by notice to show cause which makes the stockholders to whom the notice is directed defendants in the settlement proceedings. *Cohen* v. *Young*, 127 F. (2d) 721, 724. Accordingly, the appearance of Henry Kaiser and Frazer in the main action subsequent to the initiation of settlement proceedings under Rule 23(c) did not make them parties to the settlement proceedings even though they would have been parties to the action had it subsequently been tried.

The petition for settlement was signed only by counsel for Kaiser-Frazer and for the plaintiff stockholders (R. 7a, 8a, 11a). At the settlement hearings appearances were entered only for

The Court of Appeals found, pp. 25, 26 *infra*, that all the defendants below, except Brown, were parties to the Michigan proceeding and decree. This finding, except with respect to Edgar Kaiser, is contrary to the record, as summarized in the preceding footnote, and is erroneous in fact.* However, we realize that factual errors of this nature do not usually move this Court to grant certiorari. Furthermore the Court of Appeals agreed with us that Brown was not a party to the Michigan action and could not have been a party because this would have destroyed diversity (p. 26, *infra*). Accordingly, we will hereafter, for convenience, present this petition in terms of Brown only. However, if the petition is granted we believe that the review should, in the interest of justice, not be limited to the case of Brown but extend to that of all the defendants not parties to the Michigan decree; and that in the event of reversal the case be remanded to the Court of Appeals for further findings, under appropriate instructions, respecting the omitted defendants.

Kaiser-Frazer, Edgar Kaiser, Bedford and Price who had theretofore appeared in the action (P. R. 302). The order approving the compromise did not recite the appearances of any of the individual defendants. Notice of entry of this order was signed only by counsel for the plaintiff stockholders and for Kaiser-Frazer (P. R. 291, 290). See also R. 64a, 65a.

* As to Edgar Kaiser, the Court of Appeals held as a matter of law (p. 25 *infra*) that since he was named as a party to other counts in the Michigan action "his presence in that suit made him fully amenable to all claims that might be present by amendment or otherwise and hence subject to a decree specifically settling all such claims. Hence, by familiar principles of mutuality of estoppel, *Bigelow* v. *Old Dominion Copper Mining & Smelting Co.*, 225 U. S. 111, plaintiff is also bound." We disagree with the Court's conclusion which is not supported by anything in *Bigelow* and is contrary to commonly accepted principles. The question is not whether Edgar Kaiser could have been added by amendment as a defendant in the cause of action in Michigan based on the facts alleged herein; in fact, he was not.

The Opinions Below

The principal opinion below was by Judge Clark with Judges Learned Hand and Frank agreeing with the decision except as to Brown, and concurring as to Brown but for a different reason. On rehearing Judges Learned Hand and Frank wrote the majority opinion in which Judge Clark concurred but for a different reason. These various opinions may best be understood, we believe, in terms of Judge Clark's original opinion.

Petitioner below relied heavily on *Bigelow* v. *Old Dominion Copper Co.*, 225 U. S. 111, which holds that one of two wrong-doing corporate fiduciaries was not exonerated by a judgment in favor of the other in an action to which the first was not a party. In *Lawlor* v. *National Screen Service Corp.*, decided June 6, 1955, this Court reaffirmed the holding of *Bigelow* in this respect. Judge Clark thought that *Bigelow* was not controlling. He frankly expressed disapproval of the doctrine of mutuality of estoppel laid down in *Bigelow* and agreed rather with the views of the Court of Appeals for the Third Circuit in *Lawlor*, 211 F. (2d) 934, 937, which this Court had not yet reversed. He further thought that in stockholder litigation it would frequently be impossible, because of identity of citizenship of plaintiffs and defendants or otherwise, to get all prospective defendants into the court approving the settlement. Hence, he thought, in order to make Rule 23(c) work effectively unattackable releases had to be given subject to court approval, to

all possible defendants, whether in court or not.* While we disagree with the end result reached by Judge Clark, we understand the route by which he reached it. All we can say is that this disregard of *Bigelow* (later reaffirmed in *Lawlor*) and attempt to extend federal diversity jurisdiction to cases between citizens of the same state would seem to merit review by this Court.

The majority refused to subscribe to Judge Clark's reasoning, but reached the same result. Starting from the premise that *Bigelow* correctly states the law—that a judgment in favor of one defendant joint tortfeasor is not available as a defense to another joint tortfeasor not a party to the action—the original majority opinion holds that the release, independently of the judgment, released Brown, because such was the intention of the parties thereto. In reply to petitioner's argument that he wished to litigate the issue whether the release was secured by fraud—which he insisted he could do unless estopped by the Michigan judgment approving the settlement—the majority said:

> "The corporation had actually executed the release, and the Michigan judgment did no more, and needed to do no more, than decide that the consent so given was not vulnerable to any attack by the releasor" (*infra* p. 32).

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* Judge Clark also suggested that the defendant directors constitute a class; hence, the absent ones might be represented by those in court. This question was briefed on petition for rehearing wherein petitioner argued (a) that the Michigan action, so far as defendants were concerned, did not purport to be a class action; (b) the defendant directors, ten in number, were not sufficiently numerous to constitute a class, and (c) the class at most would be a "spurious" class and the judgment therein would not be binding on those who did not care to join therein (3 Moore Fed. Pract., 3423-4, 3421-2, 3442-3, 3464, 3466, 3470-2). On rehearing Judge Clark did not again advert to this suggestion.

On petition for rehearing the petitioner suggested that this sentence seemed to re-adopt the application of *res judicata* which the majority initially rejected. In response the majority said: (p. 34 *infra*)

> "We repeat what we thought we had said before: The question is not whether the Michigan judgment is *res judicata* here; *Bigelow* v. *Old Dominion Copper Co.*, 225 U. S. 111, has no bearing on the appeal."

This would seem conclusive as to the majority rationale, except for the fact that the majority concludes with the following: (p. 34 *infra*)

> "The only relevant fact is that the corporation's release of the defendants in the Michigan action is beyond any challenge by it, whether it is represented by this plaintiff or any other shareholder. This being so, the sole and only question is whether that release *ipso facto* effected a release of Brown; as it did because such is the federal law."

The "federal law" referred to is the holding in *McKenna* v. *Alston* (C. A. D. C.), 134 F. (2d) 659, 664, that a release of certain joint tortfeasors releases the remainder if such is the intention of the parties. We have no quarrel with this rule but consider it beside the point. The question in *McKenna* was whether a defendant not specifically included in the release was released by operation of law. There was no question of fraud in obtaining the release. In the instant case the release specifically and intentionally released Brown. No question was raised as to intent; the sole point made was that the release was secured by fraud.

Accordingly, the reasoning of the majority (1) that it was intended by the release to release Brown and (2) that such intent is "beyond challenge" finds no support in *McKenna*. Furthermore it wholly fails to explain *what principle of law, other than the usual rules of res judicata, prevents petitioner from challenging this release for fraud.*

We fully agree with Judge Clark's view that intent to release is not enough; that to intent there must be added the coercive effect of the order of the court under Rule 23(c) whether by virtue of *res judicata* or the same doctrine under a different name; otherwise the intent is vulnerable to attack for fraud. As Judge Clark says in his concurring opinion on rehearing: (p. 35 *infra*)

> "I concur in the result reached, but still believe that emphasis on intent without recognition or notice of the crucial role of the federal rule in making that intent operative misstates the problem. It is Hamlet with the Prince's role omitted. Stella and the other stockholders were pursuing a right of action which *they* had (whether one adds 'in right of the corporation' or not). Unless they consented or lost on a judgment on the merits—actually they could not have consented less and there was no trial—the only way they could be eliminated was by operation of F. R. 23(c) in the way stated in my original opinion. The opinion herewith has to get its authority from the rule's operation; so to recognize now would avoid confusion in the event of future resort to the decision as a precedent."

We submit that the rationale of the majority completely fails to explain why petitioner is precluded

from attacking the release for fraud if not precluded by virtue of the alleged conclusive effect of the order under Rule 23(c). If this Court agrees with this view, which is substantially Judge Clark's view, it should review this case, even if inclined to affirm the result, in order that the decision, if affirmed, should be on proper grounds. *Hurn* v. *Oursler*, 289 U. S. 238, 240.

This is not mere academic precision. In a comparable case dealing with the effect of a foreign judgment in stockholder litigation, the New York Supreme Court has held that it would give to the judgment of the foreign court only such effect as it was compelled to give by the usual rules of *res judicata*. *Darraugh* v. *Carrington*, 50 N. Y. S. 2d 481, 487, Shientag, *J.** Other state courts and federal courts in other circuits may take the same view. If Judge Clark's nationwide system of settlement by a decree binding upon absent parties, as well as those in court, is to be respected by other courts, including those which have

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* This was a motion for summary judgment to dismiss a stockholder's derivative action based on a California judgment, on the merits, in a similar action. The California judgment recited that the issues raised therein were raised in actions pending in other jurisdictions, including New York, and purported to adjudicate all such issues. Judge Shientag held that the issues before him were not adjudicated because the issues were different and some of the parties were different. Adopting the language of Judge MacLaughlin in the companion case of *Gans* v. *Hursl*, 50 N. Y. S. 2d 475, he said the California court "had no power by its own decree to clothe its judgment with a greater effect than that to which it is entitled under the principles of *res judicata* above discussed". He expressly held that identity of parties as well as issues must exist in order for *res judicata* to apply, citing as authority the recent decision of the Court of Appeals in *Elder* v. *New York & Pennsylvania Motor Express, Inc.*, 284 N. Y. 359.

first obtained jurisdiction, it can only be by virtue of the declaration by this Court that such decisions are *res judicata* as to all.

Of course, if the result reached below is wrong, review should, *a fortiori*, be granted.

Reasons for Granting the Writ

1. *The Court below has decided an important question of federal law which has not been, but should be, decided by this Court.*

The precise point presented is one of first impression. As the Court below decided, it is one of federal law. The confusion in the reasoning below, to which Judge Clark refers, increases the desirability that this Court settle the point at issue.

Whatever the rationale, the decision below comes down to this: Brown, over whom the federal court in Michigan had, and could have, no jurisdiction (because his inclusion in the action or proceeding would have destroyed diversity), is nevertheless conclusively released by action of that court so that the release cannot be questioned for fraud in any other court including one which had previously secured jurisdiction over Brown.

The juridical importance of this extension of diversity jurisdiction is obvious. Its practical importance in the settlement, under Rule 23(c), of nation-wide corporate litigation is equally obvious. Whether these consequences be thought good or bad the proper rule, and the reasons therefor, should be stated by this Court.

2. *The Court below in holding that the order of the Michigan Court and/or the release given pursuant thereto is beyond attack, for fraud, in another court, even as to persons not parties to the Michigan order or proceedings, has decided an important question of federal law in a way probably in conflict with applicable decisions of this Court and of courts of appeal in other circuits.*

The rule of mutality of estoppel in suits against joint tortfeasors laid down by this Court in *Bigelow** and followed in various circuits** would seem to require the holding that the decision in Michigan does not estop petitioner, as to Brown, from relitigating the issue of fraud in procuring the release. Judge Clark recognized the force of *Bigelow* but expressed the belief that its "much criticized" policy should not be applied in the context of settlement proceedings under Rule 23(c) (*infra* p. 26). However, in *Lawlor*

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* The holdings in *Bigelow* here pertinent were (1) that it is a principle of elementary law that the estoppels of a judgment must be mutual; (2) that to this rule there is an exception "where the culpability of defendant is altogether dependent upon the culpability of one exonerated in a prior suit upon the same facts when sued by the same plaintiff" (225 U. S. 1, pp. 127, 128) and (3) that this exception does not apply in the case of wrongdoing corporate fiduciaries who are joint tortfeasors, jointly liable, neither being secondarily liable merely on account of the wrong of the other.

** *Cf. Lewis* v. *Ingram* (8th Circ.), 57 Fed. (2d) 463, 465, where the Court said "that another trial court hearing what we assume to be substantially the same evidence, came to the conclusion that fraud had not been proven [in a prior suit against two of three wrongdoing fiduciaries] is a circumstance worthy of serious consideration; but it does not relieve the trial judge from the duty of exercising his own judgment as to the facts nor foreclose him from finding that there was bad faith." The court held that the prior decision of another federal court, affirmed in the Fifth Circuit, exculpating two of three allegedly wrongdoing fiduciaries, was not *res judicata* as to the third when sued in the Eighth Circuit.

v. *National Screen Service Corp.* (June 6, 1955) this Court adhered to this "much criticized" policy and specifically held that joint tortfeasor defendants who were not, and could not have been, parties to a decree, could not rely on it as *res judicata*. Had Judge Clark's opinion been the majority opinion we believe that this Court's subsequent decision in *Lawlor* would have made the grant of certiorari practically automatic. *Cf. Myers* v. *Reading Co.*, 331 U. S. 477, 479. We submit that the result should be no different merely because the majority disclaimed any intention to circumvent or limit *Bigelow* but has placed its decision upon other grounds which, as Judge Clark pointed out, are obviously beside the point.

As shown by the analysis of the majority opinion, *supra* pp. 11-13, the majority simply says (1) the decision is not *res judicata;* (2) however, the release covers Brown because so intended, and (3) the release is "beyond challenge" for fraud. This final statement, we submit with deference, is either a mere *ipse dixit,* or a readoption under another name, or no name, of the doctrine of *res judicata* theretofore rejected. As Judge Clark says, the omission to consider the coercive effect of the order of the Michigan Court is "Hamlet with the Prince's role omitted." We submit that the majority rationale disposes neither of the conflict with *Bigelow,* and hence with *Lawlor,* nor of the necessity of giving consideration to the alleged coercive effect of an order under Rule 23(c) upon which Judge Clark relies.

3. *The decision below violates an important federal policy in facilitating questionable settlements of admitted wrongs by corporate fiduciaries, and is in probable conflict with decisions of this Court establishing such policy.*

The decision of the Court of Appeals for the Sixth Circuit holds that the claim sued on below, and certain claims presented in other stockholder actions, were meritorious.* The decision of such Court of Appeals further shows that the claim of fraud in the settlement is one of substance and that there is a substantial probability that petitioner might have sustained this claim had he been allowed to present it below.**

Heretofore this Court has insisted upon strict accountability of corporate fiduciaries, and has placed

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* The District Judge found merit in three of the nine claims settled upon evidence which indicated their value of $2,300,000 to $4,100,000 in round figures, exclusive of interest. The Court of Appeals found merit in another cause of action, the one sued on below, which fairly added a further principal liability of $1,700,000, bringing the total to $4,000,000 to $5,800,000. Judge Allen valued these claims up to a total of $10,500,000. *Masterson* v. *Pergament*, 203 F. (2d) 315, 325-329, 331, 335.

** Judge Allen summarized the evidence which in her opinion showed fraud in the settlement negotiations. The principal actor in these proceedings was Brown. Judge Allen wrote "At the proceeding in the District Court, he [Brown] testified that in these negotiations with Chess and Perlman [attorneys for the settling stockholders] his effort was to get the easiest possible terms of settlement for the individual defendants [including himself] * * * and that he therefore avoided making disclosures or stating facts or furnishing information that would support a recovery for Kaiser-Frazer in these suits. This striking admission was made although Brown's firm was paid by Kaiser-Frazer for these negotiations" (R. 58a, 59a).

The majority of the Court of Appeals for the Sixth Circuit—so the Court of Appeals below held—disagreed with Judge Allen's conclusion that the settlement was fraudulent, albeit in somewhat

upon them the burden of proof, when challenged, to show that their dealings with the corporation were both fair in result and fairly conducted. *Geddes* v. *Anaconda Copper Mining Co.*, 254 U. S. 590, 599; *Pepper* v. *Litton*, 308 U. S. 295. As this Court said in the latter case, at p. 306:

> "A director is a fiduciary. *Twin-Lick Oil Co.* v. *Marbury*, 91 U. S. 587, 588. So is a dominant or controlling stockholder or group of stockholders [Henry Kaiser and Joseph Frazer]. Their powers are powers in trust. See *Jackson* v. *Ludeling*, 21 Wall. 616, 624. Their dealings with the corporation are subjected to rigorous scrutiny, and where any of their contracts or engagements with the corporation is challenged the burden is on the director or stockholder not only to prove the good faith of the transaction but to show its inherent fairness from the viewpoint of the corporation and those interested therein."

We do not believe that a proceeding to approve a settlement under Rule 23(*e*) should be used as a device to excuse corporate fiduciaries from this strict accounting. True, a director when once exonerated should not be again compelled to explain and to justify; but heretofore under *Bigelow*, this has meant that unless such director was a party to the first action

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ambiguous terms." What the majority said was that it refused "to be led into a discussion" of the question of fraud in the settlement because the District Court in hearing evidence as to the advisability of settlement "sat as a third party to the compromise" and there was no fraud *as to him*. The majority then added "in any event he ruled against the objectors upon these matters upon consideration of substantial evidence and in the exercise of a sound judicial discretion." 203 F. 2d, 331, R. 82a. (Emphasis ours.)

he could not claim the benefit of a favorable decision therein. Despite criticism by some courts and text writers* this Court has recently refused in *Lawlor* to change the rule of *Bigelow*.

Accordingly, the infringement below of the requirement of mutuality of estoppel set forth in *Bigelow* and *Lawlor* equally infringes the policy of strict scrutiny of dealings between directors and their corporation, set forth in *Geddes* and *Pepper*. Indeed, if the statement of the majority below that they rely wholly on the release and not at all on the Michigan judgment is to be taken at face value, their decision, in attempting to avoid *Bigelow*, collides squarely with *Geddes* and *Pepper*.

PRAYER

For the foregoing reasons petitioner prays that this petition be granted to the end that this case may be reviewed and determined by this Court; that the judgment of the Court of Appeals be reversed; and that the petitioner be granted such other and further relief as may be proper.

Respectfully submitted,

MICHAEL STELLA

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* *Cf.* the dissenting opinion of Judge Clark in *Riordan v. Ferguson*, 147 F. (2d) 983, 991-993, to which Judge Clark referred in his original opinion, *infra* p. 26.

Original Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 60—October Term, 1954

Argued October 7, 1954 Decided December 7, 1954

Docket No. 23107

MICHAEL STELLA, on behalf of himself and all other stockholders of Kaiser-Frazer Corporation,

Plaintiff-Appellant,

v.

HENRY J. KAISER, JOSEPH W. FRAZER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOFFETT, HICKMAN PRICE, JR., WALSTON S. BROWN and KAISER-FRAZER CORPORATION,

Defendants-Appellees.

Before CLARK, *Chief Judge*, and L. HAND and FRANK, *Circuit Judges*.

Appeal from the United States District Court for the Southern District of New York, Sylvester J. Ryan, *Judge*.

Plaintiff, Michael Stella, appeals from a summary judgment for defendants, finding his stockholders' derivative action against the officers and directors of

Kaiser-Frazer Corporation for alleged mismanagement of the affairs of that corporation barred by a decree of settlement in another action. Affirmed.

See also D. C. S. D. N. Y., 82 F. Supp. 301.

LEWIS M. DABNEY, JR., New York City, for plaintiff-appellant.

H. BARTOW FARR, New York City (Willkie, Owen, Farr, Gallagher & Walton, New York City, on the brief for defendant-appellee Kaiser-Frazer Corporation, and Corbin, Bennett & Delehanty, New York City, on the brief for defendants-appellees Henry J. Kaiser, Joseph W. Frazer, Edgar F. Kaiser, G. G. Sherwood, E. E. Trefethen, Jr., Clay P. Bedford, W. A. MacDonald, O. B. Motter, Hickman Price, Jr., and Walston S. Brown), for defendants-appellees.

CLARK, *Chief Judge.*

This appeal concerns the effect as res judicata and bar of a decree of settlement of a stockholders' derivative action entered by a federal court pursuant to F. R. C. P. 23(c), and of the releases executed thereunder. Plaintiff-appellant is one of several stockholders bringing a variety of derivative actions on behalf of the Kaiser-Frazer Corporation against its officers and directors. By order of a United States District Court in Michigan, after due notice, all claims were there consolidated and a settlement was reached which purported to bind all stockholders and all officers of the corporation. *Pergament* v. *Frazer*, D. C. E. D. Mich., 93 F. Supp. 13-45. Despite vigor-

ous protest by several stockholders, including plaintiff, the Court of Appeals affirmed the settlement, *Masterson v. Pergament*, 6 Cir., 203 F. 2d 315-336, and the Supreme Court denied certiorari, 346 U. S. 822. When plaintiff thereafter sought to resume in the district court below the action he had begun before the institution of the Michigan proceedings, see *Stella v. Kaiser*, D. C. S. D. N. Y., 82 F. Supp. 301, defendants-appellees successfully pleaded the Michigan judgment in bar. In asking us to reverse the entry of summary judgment below, plaintiff attacks the conclusive nature of the Michigan settlement on a variety of grounds.

Plaintiff's complaint charged breach of fiduciary duty in defendants' attempted stabilization of the price of Kaiser-Frazer stock at the time of a public stock offering in February, 1948. There is apparently no claim of illicit personal gains made by defendants at the corporation's expense. The gravamen of the complaint is violation of the antimanipulation and antifraud sections of the Securities Exchange Act of 1934 and the Securities Act of 1933, together with negligent waste of Kaiser-Frazer's corporate assets. *Cf. Kaiser-Frazer Corp. v. Otis & Co.*, 2 Cir., 195 F. 2d 838, certiorari denied, 344 U. S. 856.

There is no doubt that this claim was one of those compromised and settled by the Michigan decree. See *Pergament v. Frazer, supra*, D. C. E. D. Mich., 93 F. Supp. 13, 33-35. Plaintiff was an active litigant in the proceedings there and is bound under the principles of res judicata at least with respect to those defendants who were parties of record in Michigan. *Baldwin v. Iowa State Traveling Men's Ass'n*, 283

U. S. 522. Even without his active participation Stella would have been bound by the Michigan court's action, since it was a conclusive adjudication of a "true" class action, *Hansberry* v. *Lee*, 311 U. S. 32, 132 A. L. R. 741; 3 Moore's Federal Practice ¶ 23.11 (2d Ed. 1948); McLaughlin, *Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit*, 46 Yale L. J. 421, 424, and since, moreover, there was adequacy of notice and representation as found by the Sixth Circuit, *Masterson* v. *Pergament, supra*, 6 Cir., 203 F. 2d 315, 330. See *Dickinson* v. *Burnham*, 2 Cir., 197 F. 2d 973, certiorari denied 344 U. S. 875, and proposed Rule 23(d) in Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts, May 1954, pp. 15-17, discussed in Wright, *Amendments to the Federal Rules: The Function of a Continuing Rules Committee*, 7 Vand. L. Rev. 521, 539-540.

Plaintiff asserts, however, that the settlement itself was procured by fraud and that the Michigan decree is subject to attack for failure to decide this issue. But in this he is in error, for the fraud issue was in fact disposed of adversely to him by the Court of Appeals: *Masterson* v. *Pergament, supra*, 6 Cir., 203 F. 2d 315, 330-331. Since this issue was repeatedly raised, it cannot now be made the basis for collateral attack. *De Bobula* v. *Goss*, D. C. Cir., 193 F. 2d 35.

Plaintiff's further argument vigorously pressed that the Michigan proceedings are not res judicata because they were merely administrative borders on the fantastic. It can hardly be claimed that that ancient device of a court of equity, the class suit, is nonjudicial; and there is nothing in the substantive provisions

of this rule—"A class action shall not be dismissed or compromised without the approval of the court"—to change its character. Actually, as is well settled, the federal district courts, as constitutional courts, have only judicial, and no administrative, jurisdiction, *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428, and the Federal Rules do not and cannot change that jurisdiction. F. R. C. P. 83, 28 U. S. C. § 2072. In none of the cases or authorities dealing with this rule and cited *supra* is there any suggestion that its impact is other than completely judicial. Plaintiff places considerable reliance upon district court rulings departing from the usual conceptions of a trial such as refusal of examination before trial and admission of incompetent evidence. Those have not been reviewed on appeal; whether correct or not, they cannot negative district court jurisdiction any more than can certain expressions attributed to defendants, but quoted rather out of context.

Plaintiff's most cogent attack on the Michigan decree focuses on the lack of complete identity between the parties of record here and in Michigan. One of the defendants, Edgar F. Kaiser, although he was a party to the Michigan suit, was not named in that count of the Michigan complaint which dealt with plaintiff's particular claim. Nonetheless, his presence in that suit made him fully amenable to all claims which might be present by amendment or otherwise and hence subject to a decree specifically settling all such claims. Hence by familiar principles of mutuality of estoppel, *Bigelow* v. *Old Dominion Copper Mining & Smelting Co.*, 225 U. S. 111, plaintiff also is bound. All of the other defendants except Walston

S. Brown were named as defendants both of the decree in general and of this particular count. Thus they satisfy all requirements of identity, and res judicata applies. This leaves only the case of Brown, to which we now turn.

At first glance plaintiff's contention that he should be allowed to pursue his claim against Brown seems to have considerable force. Brown was originally a party to the Michigan action, but was dropped because his presence would have destroyed the diversity jurisdiction of the Michigan court. His participation was thus limited to the giving of testimony. But even so, we think a more complete analysis requires the rejection of the contention.

Plaintiff relies heavily on *Bigelow* v. *Old Dominion Mining & Smelting Co., supra,* 225 U. S. 111. But this case decided only the effect which exoneration of one joint tort-feasor should have on a suit against another. The policy reasons against allowance of such exoneration as a bar to action against another, which have been much criticized, see, *e. g., Riordan* v. *Ferguson,* 2 Cir., 147 F. 2d 983, 991-993; *Bruszewski* v. *United States,* 3 Cir., 181 F. 2d 419; Note, *Res Judicata: The Requirement of Identity of Parties,* 91 U. of Pa. L. Rev. 467, have little relevance to the situation of settlement which is before us here. Even if we were to concede, arguendo, that an aggrieved party should have several opportunities to attain one recovery, that would not militate in favor of permitting a double remedy for a single wrong. Either the receipt of full satisfaction for a claim or the unconditional release of it bars the plaintiff from further prosecution of that particular cause of action against any one. *Rushford* v. *United States,* D. C.

N. D. N. Y., 92 F. Supp. 874, affirmed per curiam, 2 Cir., 204 F. 2d 831; *Larabell* v. *Sckuknecht*, 308 Mich. 419, 14 N. W. 2d 50; Prosser, Torts § 109 (1941).

The Michigan compromise was in fact both a satisfaction and a release of plaintiff's claim. The terms of the settlement were carried out and the release was wholly unconditional. No attempt was made in Michigan to reserve rights against the absent Brown; on the contrary, the compromise explicitly purports to release Brown. It may not be clear whether the Michigan findings on the adequacy and the sufficiency of the consideration offered by defendants are to be taken as a determination of the consideration for the release or of the fact of satisfaction of the claim itself. In either case, however, the only issue, as I see it, is whether a judicially effected compromise should have the same binding effect as a voluntary one would have. The writer of this opinion can see no reason why it should not. The judicial scrutiny contemplated by F. R. C. P. 23 (c) gives to the parties a greater degree of protection than do many private settlements. The salutary effect of the rule would be seriously impaired if dissatisfied parties could revive compromised claims against parties whom the settlement expressly covered. The Third Circuit recently held that, even without judicial safeguards, a prior consent judgment may be successfully invoked by any defendants whose relationship to earlier defendants was "close enough." *Lawlor* v. *National Screen Service Corp.*, 3 Cir., 211 F. 2d 934, certiorari granted 75 S. Ct. 42. Here we need not go so far, but may hold simply that a member of the class of stockholders in a derivative action is bound by and must accept a judicially approved compromise in his

behalf. This is the traditional class suit or representative situation, see Advisory Committee's Note to F. R. C. P. 23(a)(1); 3 Moore's Federal Practice 3436, 3437, 3459, 3460 (2d Ed. 1948). Since Stella would thus be bound even by a totally adverse judgment, there seems no reason why he—so represented—should not be bound by the release and satisfaction ordered by the court.

As the concurring opinion herewith shows, my brethren reach the same conclusion as to the operation of the release, but takes a somewhat different path. Accepting the modern law that the release of one joint tort-feasor no longer automatically releases all, they nevertheless assume to find here—apparently from the words of the release itself—the necessary intent of the parties now an essential requisite. On this basis the release operates independently of the legal action which gave it birth and being. Although the result is the essential matter and these nuances of approach may not have great significance to the parties, yet it is desirable from the standpoint of precedent to hew to the correct doctrine, one of potential utility in later cases. And there I feel compelled to suggest, with deference, that I believe my brothers are accepting fiction for fact, with the result of stressing only the nonessential. For, apart from the legal proceedings authorized by the rule, the release cannot have actual validity, nor the releasors the necessary intent. Obviously a number of those necessarily involved did not have the attributed intent; indeed, quite the contrary. That includes all those listed as objectors in the Michigan action, Stella among the rest. Had their objections not been legally surmountable, the release would be without force. Hence we

should examine the legal action which furnishes the legally operative acts, and need spend little effort on some constructive intent assumable once the legal action is found correct. Since that correctness appears here, the rest follows, even my brothers' superstructure of rationale if that is deemed a necessary prop.

In considering the validity of these transactions ordered on behalf of Stella, we look primarily at the protection accorded him in view of his claim that the release is not binding on him, being against his will. But the same result against him seems required under another theory, resting upon strict application of the doctrine of mutuality of estoppel, by regarding Brown as properly represented in the Michigan action. Under this view the Michigan settlement is binding upon Brown and therefore is also res judicata as to Stella. While my brethren do not accept this rationale, is seems to the writer not merely a sound and necessary deduction from the authority given by the rule, but also a desirable use of a too-little employed procedural device. We have noted above the present trend toward a greater binding character for class suits. See particularly the discussion and the authorities cited in *Dickinson* v. *Burnham*, *supra*, 2 Cir., 197 F. 2d 973, 979. Without going so far as many urge, it seems quite appropriate here to hold Brown bound by the Michigan judgment.

Proceedings under F. R. C. P. 23(c) of necessity involve a great number of potential litigants. In order to preserve diversity jurisdiction, some of these interested persons must be excluded from official participation in the action. If these persons are given notice and if they are otherwise adequately repre-

sented, they may nevertheless be bound by the court's decree. In the Michigan litigation in this case the directors, as well as the stockholders, met the necessary qualifications for a class. Their number was so great that jurisdictional considerations made it impossible to join them all as parties; they had substantially identical interests in the litigation, which raised an issue common to them all. *Hansberry* v. *Lee, supra,* 311 U. S. 32, 41; Restatement, Judgments § 86, comment *b* (1942). It was presumably only a matter of convenience that when the diversity problem arose a director, rather than a stockholder, was dropped from the ranks of official litigants. As a member of the class of directors, Brown does not complain, nor could he, of the diligence with which his interests were protected. Hence under the authorities just cited he is bound by the compromise decree, even though he was not an official party to it. The decree thus meets all the requirements of res judicata as to Brown, as well as to all other defendants. And Brown being bound to Stella as one of the parties, Stella is in turn bound as to him.

Affirmed.

L. HAND, *Circuit Judge* (concurring):

I agree in the result as to all the defendants, and in the reasoning by which it is reached as to all except Brown. As to him I rest my vote upon somewhat different grounds. I do not believe that a judgment in favor of one director of a corporation is res judicata in favor of the others; but, since in the case at bar the directors were all joint tortfeasors, I rely upon

the doctrine that the release of one releases all. That doctrine has been somewhat impaired, and was never well grounded in its absolute and unconditional form; but I am content arguendo to accept the following statement of it by Mr. Justice Rutledge (then in the Court of Appeals of the District):* "Whether the settlement is made and accepted as full satisfaction or merely as the best obtainable compromise for the settler's liability is the crucial issue, and ordinarily one of fact. If however the agreement's terms leave no room for doubt, the decision should be made as a matter of law." I also accept the following gloss of the Restatement:** "a document in the usual form of a release given to one of them" (several joint tortfeasors) "is construed as intended to discharge all claims for the tort and operates to discharge others also liable for the same harm." The release in the case at bar satisfied both these tests. Its preambles recited among other things that "the parties desire to dismiss and compromise the stockholders derivative action" (the Michigan suit) "and to resolve all of the controversies raised by the allegations of the amended complaint." Again, "the plaintiffs deem it in the best interest of Kaiser-Fraser * * * that the stockholders derivative action be dismissed and compromised upon the terms and conditions hereinafter set forth." The operative words of release included "all claims, charges and allegations set forth in the amended complaint and the notice to amend and supplement the amended complaint." Finally, the par-

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* *McKenna v. Austin*, 134 Fed. (2) 659, 664.

** Restatement of Torts, Vol. 4, §885, Comment (d).

ties clearly meant to put an end to any claim against Brown for the release included him, eo nomine; indeed it appears that he was omitted as a defendant to the action only because his presence would destroy the jurisdiction of the court.

Although the Michigan judgment does not estop the plaintiff in this action from attacking the validity of the release as to Brown, and although the district court would therefore be free to decide that it should be set aside, it would still be obliged to dismiss the complaint because the release of the other directors would remain unscathed. The situation might be different if the Michigan judgment had been on the merits of the claim; I need not say whether such a judgment would release Brown. The corporation had actually executed the release, and the Michigan judgment did no more, and needed to do no more, than decide that the consent so given was not vulnerable to any attack by the releasor. That enabled Brown to invoke the doctrine I mention.

Judge FRANK concurs in Judge HAND's opinion.

Opinion on Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 60—October Term, 1954

Submitted February 21, 1955 Decided April 11, 1955

Docket No. 23107

MICHAEL STELLA, on behalf of himself and all other stockholders of Kaiser-Frazer Corporation,

Plaintiff-Appellant,

v.

HENRY J. KAISER, JOSEPH W. FRAZER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., WALSTON S. BROWN and KAISER-FRAZER CORPORATION,

Defendants-Appellees.

Before CLARK, *Chief Judge*, and L. HAND and FRANK, *Circuit Judges*.

On Petition for Rehearing.

LEWIS M. DABNEY, JR., for Plaintiff-Appellant.

L. HAND and FRANK, *Circuit Judges*. The appellant begins his petition by saying that it is "addressed to the concurring opinion", and for that reason we

confine ourselves to the point raised therein. First, we hold that the question whether the release of those who were defendants in the Michigan action is a release of Brown is a question of federal law, because the only claim in suit arises under the Securities and Exchange Act. *Garrett* v. *Moore-McCormack*, 317 U. S. 239, *Dice* v. *Akron, etc. Railroad*, 342 U. S. 359. Tested by federal law the appeal falls directly within the doctrine of *McKenna* v. *Austin*, 134 Fed. (2) 659, 664 (C. A. D. C.) for the releasor—i. e. the corporation—expressly included Brown in the release, which can leave no doubt as to its intent. We repeat what we thought we had said before: the question is not whether the Michigan judgment is res judicata here; *Bigelow* v. *Old Dominion Copper Company*, 225 U. S. 111, has no bearing on the appeal. Nor would it better the plaintiff's case, had it appeared that the corporation did not add anything to the consideration for the inclusion of Brown. The only relevant fact is that the corporation's release of the defendants in the Michigan action is beyond any challenge by it, whether it is represented by this plaintiff or any other shareholder. That being so, the sole and only question is whether that release ipso facto effected a release of Brown; as it did, because such is the federal law.

The petition is denied.

CLARK, *Chief Judge* (concurring).

I concur in the result reached, but still believe the emphasis on intent without recognition or notice of the crucial role of the federal rule in making that intent operative misstates the problem. It is Hamlet with the Prince's role omitted. Stella and the other stockholders were pursuing a right of action which *they* had (whether one adds "in right of the corporation" or not). Unless they consented or lost on a judgment on the merits—actually they could not have consented less and there was no trial—the only way they could be eliminated was by operation of F. R. 23(c) in the way stated in my original opinion. The opinion herewith has to get its authority from the rule's operation; so to recognize now would avoid confusion in the event of future resort to the decision as a precedent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 202.

MICHAEL STELLA, on behalf of himself and all other stockholders of Kaiser-Frazer Corporation,

Petitioner,

against

HENRY J. KAISER, JOSEPH W. FRAZER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., WALSTON S. BROWN and KAISER-FRAZER CORPORATION,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION OF WRIT OF CERTIORARI.

This brief is submitted in opposition to the petition for certiorari served on respondents on June 29, 1955. The opinions of the Court of Appeals are printed in Petitioner's brief. The opinion of the United States District Court for the Southern District of New York (not officially reported) is printed herewith.

Statement.

This is a stockholder's action brought by one of the stockholders of Kaiser-Frazer Corporation on behalf of said corporation.

The claim involved in this action has been settled and all of the defendants herein have been expressly released.

Both the settlement and the release were expressly approved in a 23(c) proceeding by the United States District Court for the Eastern District of Michigan in a stockholder's action, entitled *Pergament* v. *Frazer*, 93 F. Supp. 13 (E. D. Mich. 1950), *aff'd sub-nom Masterson* v. *Pergament*, 203 F. 2d 315 (6th Cir. 1953), *cert. denied* 346 U. S. 832 (1953).

This petitioner stockholder, among others, vigorously opposed this settlement on the same grounds he now urges, *i. e.*, that the settlement was procured by fraud. This claim of fraud was expressly rejected by both the District Court for the Eastern District of Michigan and the Court of Appeals for the Sixth Circuit.

Despite this, petitioner stockholder seeks to relitigate the entire issue of fraud in violation of an order of the approving court which declared the settlement to be binding upon each and all of Kaiser-Frazer's stockholders. The sole ground relied upon by petitioner for continuing this settled action is that one of the directors, Brown,* was not a party to the 23(c) proceeding, having been dropped

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* Petitioner, while conceding, for the purpose of the petition, that the settlement and release is effective against everyone except Brown, contends in an elaborate footnote that the court below was wrong in this determination. To straighten out the record, the release in this action released not only the party defendants in the action, but also eight other individuals and three corporations. Of the ten individual defendants, petitioner claims only three were in court in Michigan and parties to the Michigan decree (Pet. P. R. p. 7). Actually Messrs. Henry J. Kaiser, Edgar F. Kaiser, Frazer, Bedford, MacDonald and Price formally appeared in the *Pergament* action (*Pergament* Rec. Vol. I, pp. 2, 4, 7). Of these, the two Messrs. Kaiser, Frazer and Price testified in person at the hearings. (*Pergament* Rec. Index, pp. 7, 8). In addition Messrs. Brown and Trefethen were also witnesses and testified extensively (*Pergament* Rec. Index, pp. 5, 6, 7, 9.) Thus, only Sherwood and Motter (both deceased) did not appear or participate in the *Pergament* proceedings.

therefrom because his presence would defeat the jurisdiction of the approving court. It is, therefore, claimed by petitioner that Brown at least cannot set up the release as a bar to the continuance of this action unless and until the absence of fraud in respect of the settlement agreement is re-established by another court in an action apparently to be continued against Brown alone.

It is conceded by petitioner that the claim involved herein has been released and that this release has been judicially approved and that this approval has been affirmed with certiorari denied. But Petitioner claims the right to relitigate the validity of the release against Brown alone.

The Petition.

First Reason for Review.

The first reason upon which petitioner relies in asking that this court grant the writ of certiorari is that the question decided by the court below is an important question of federal law which has not been but should be decided by this court.

This so-called important question is also classified as one of first impression and apparently derives its importance primarily because the Court of Appeals for the Second Circuit disagreed on the basis of the decision. This is no basis for the granting of a writ of certiorari (Rule 19 of the Rules of the Supreme Court of the United States).

A brief look at the question involved robs it of distinction. The settlement agreement, which included the the release to Brown, was expressly made subject to the approval of the United States District Court for the Eastern District of Michigan. Without this approval, the

agreement and the release were to be null and void (P. R. 161)*. The agreement and release were approved, the approval was affirmed and certiorari was denied.

In the instant litigation the United States District Court for the Southern District of New York on the basis of this judicially approved release granted to the respondents summary judgment in an opinion printed herewith (pp. 8-9).

The Court of Appeals affirmed upholding the validity of the release and refusing to permit the relitigation of the issue of fraud merely because Brown had been dropped as a party to the Michigan action in order to preserve diversity jurisdiction.

To claim as petitioner does that this represents an extention of diversity jurisdiction is palpably absurd. All the decision stands for is that a release approved in proceedings pursuant to Rule 23(c) is valid and effective according to its terms.

The Second Reason.

The second reason upon which petitioner relies for the granting of a writ of certiorari is that the decision of the court below p . bably conflicts with decisions of this court and with decisions in other circuits.

For this argument petitioner claims a conflict with the cases of *Bigelow* v. *The Old Dominion Copper & Smelting Co.*, 225 U. S. 111 (1912) and *Lawlor* v. *The National Screen Service Corp.*, 75 Sup. Ct. 865 (1955).

The decision in neither of these cases would appear to be relevant to the position taken by the petitioner. Neither case involved the validity of a release that had judicial approval under Rule 23(c) nor parties who were in privity with each other.

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* P. R. refers to the record in the 23(c) proceeding.

The Lawlor case is also distinguishable on a number of other grounds, including the fact that the new defendants named therein were not parties to the conspiracy alleged in the earlier action, the difference between the causes of action involved in the first and second lawsuit, and the fact that the liability of defendants in the later action was not altogether dependent on the culpability of the defendants in the earlier action.

In the instant case it is clear that Brown must be regarded as in privity with the defendants in the Michigan action and entitled to plead the judicially approved settlement in that action as a bar to the present action to the same extent as if he were a formal party to that action. This conclusion of privity is compelled in view of Brown's position as a director of defendant corporation, *Straus* v. *American Publishers Assn.*, 201 Fed. 306 (2d Cir., 1912), *app. dis.*, 235 U. S. 716 (1914), *Ganca Importing Co.* v. *American Importing & Transportation Co.*, 247 Fed. 413 (2d Cir., 1917), because of his close association with the parties to the prior action and his personal and financial interest in the result by reason of the statutory obligation of contribution, cf. *Columbia Ins. Co. of New Jersey* v. *Mart-Waterman Co.*, 11 F. 2d 216 (2d Cir.), *cert. denied* 271 U. S. 672 (1926), and because of his participation in, and control of, the prior litigation to the same or to a greater extent than that of the formal party defendants. *U. S. Envelope Co.* v. *Transo Paper Co.*, 221 Fed. 79 (D. Conn., 1915); *E. I. du Pont de Nemours Co.* v. *Sylvania Industrial Corp.*, 122 F. 2d 400 (4th Cir., 1941); *Universal Oil Products Co.* v. *Winkler-Koch Engineering Co.*, 27 F. Supp. 161 (N. D. Ill., 1939).

Nothing in Judge Clark's opinion is in conflict with the Bigelow or the Lawlor decisions. He pointed out that the

policy of the Bigelow case had "little relevance". He did not rely on the decision of the Third Circuit in the Lawlor case as claimed by Petitioner (Pet. p. 10), saying in regard to this decision "here we need not go so far".

The Third Reason.

The third reason upon which petitioner relies is that the decision below conflicts with the important federal policy of preventing questionable settlements by corporate fiduciaries. Petitioner argues, in effect, that the courts below decided that any settlement approved under 23(c) exonerates all fiduciaries against whom a claim could be asserted. This is not so. The courts below merely decided that the particular settlement agreement in the case at bar was valid and released all of those persons (including Brown) which it expressly purported to release. This is neither novel nor dangerous doctrine and raises no question of federal policy. The Court was not concerned with and never even mentioned any question of fiduciary accountability, and all of petitioner's discussion of this issue is entirely irrelevant.

Conclusion.

No basis for granting a writ of certiorari exists and the prayer of the petition should be denied.

Respectfully submitted,

LOUIS F. CARROLL,
Counsel for Respondent,
Kaiser-Frazer Corporation.

HAROLD J. CORBIN,
Counsel for Respondents,
Henry J. Kaiser, Joseph W. Frazer, Edgar F. Kaiser, G. G. Sherwood, E. E. Trefethen, Jr., Clay P. Bedford, W. A. MacDonald, O. B. Motter, Hickman Price, Jr., and Walston S. Brown.

UNITED STATES DISTRICT COURT.

SOUTHERN DISTRICT OF NEW YORK.

MICHAEL STELLA, on behalf of himself and all other stockholders of Kaiser-Frazer Corporation,

Plaintiff,

against

HENRY J. KAISER, JOSEPH W. FRAZER, EDGAR F. KAISER, G. G. SHERWOOD, E. E. TREFETHEN, JR., CLAY P. BEDFORD, W. A. MACDONALD, O. B. MOTTER, HICKMAN PRICE, JR., WALSTON S. BROWN and KAISER-FRAZER CORPORATION,

Defendants.

(*The Original Opinion is Endorsed on the Moving Papers.*)

The identical claims asserted in the instant derivative suit brought on behalf of the Kaiser-Frazer Corporation were alleged in *Pergament* v. *Joseph W. Frazer, et al.*, a derivative suit filed by another stockholder of the same corporation. The Pergament suit was settled after proceedings duly had under Rule 23(c) F. R. P. C. upon due notice. The plaintiff herein appeared in these proceedings and objected to the settlement proposed; his objections after full hearing were overruled (98 F. Supp. 9, aff'd 203 F. 2d, 315 (6th Cir. 1953) cert. den. October 12, 1953, Docket No. 133).

The settlement in the Pergament suit released all the defendants named in the instant suit from any and all claims arising out of the matters alleged herein. It was determined that fraud was not present in the accomplish-

ment of the Pergament action, but, in any event, the settlement may not be here collaterally attacked after judicial approval.

Motion granted; complaint dismissed with prejudice, without costs; the Clerk is directed to enter judgment accordingly.

SYLVESTER J. RYAN,
U. S. D. J.

2/11/54